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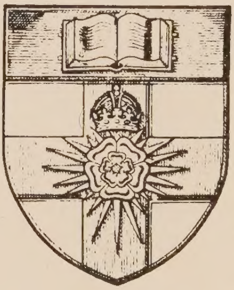

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1950

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

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THE

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FOR

ENGLAND AND WALES

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1941–1950

MEMORANDA.

1940.

Dec. 10. *This day* THE RIGHT HON. SIR HARRY TRELAWNY EVE, *sometime a Justice of His Majesty's High Court of Justice, Chancery Division, died, aged* 84.

1941.

Jan. 1. *The Dignity of a Baron of the United Kingdom was conferred upon* THE RIGHT HON. SIR FRANK BOYD MERRIMAN, *President of The Probate, Divorce and Admiralty Division, by the name, style and title of Baron Merriman of Knutsford, in the County Palatine of Chester.*

Jan. 1. *This day* THE HON. SIR CHARLES STAFFORD CROSSMAN, *a Justice of His Majesty's High Court of Justice, Chancery Division, died, aged* 70.

Jan. 1. AUGUSTUS ANDREWES UTHWATT, ESQ., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Crossman, deceased, and was afterwards knighted.*

June 10. *The Dignity of a Baron of the United Kingdom was conferred upon* THE RIGHT HON. SIR WILFRID GREENE, *Master of the Rolls, by the name, style and title of Baron Greene of Holmbury St. Mary, in the County of Surrey.*

July 26. THE RIGHT HON. VISCOUNT MAUGHAM, *one of the Lords of Appeal in Ordinary (sometime Lord Chancellor) retired.*

July 26. THE RIGHT HON. LORD MACMILLAN *resumed his position as one of the Lords of Appeal in Ordinary, in place of Viscount Maugham, retired.*

Oct. 30. *This day* THE HON. SIR JOHN ANTHONY HAWKE, *one of the Justices of His Majesty's High Court of Justice, King's Bench Division, died, aged* 72.

Nov. 15. SIR WILLIAM NORMAN BIRKETT, K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of Mr. Justice Hawke, deceased.*

1942.

Jan. 1. THE RIGHT HON. SIR ALBERT CHARLES CLAUSON, *a Lord Justice of Appeal, retired, and was granted the dignity of a Baron of the United Kingdom by the name, style and title of Baron Clauson of Hawkshead, in the County of Hertford.*

March 12. DAVID PATRICK MAXWELL FYFE, ESQ., K.C., *was appointed Solicitor-General in the place of The Right Hon. Sir William Allen Jowitt, K.C., and was afterwards knighted.*

June 19. *This day* THE HON. SIR WALTER GREAVES-LORD, *sometime a Justice of His Majesty's High Court of Justice, King's Bench Division, died, aged* 63.

July 23. *This day* THE RIGHT HON. SIR CHARLES SARGANT, *sometime a Lord Justice of Appeal, died, aged* 86.

Aug. 9. *This day* THE HON. SIR GEORGE PHILIP LANGTON, O.B.E., *a Justice of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, died, aged* 60.

Aug. 21. *This day* THE RIGHT HON. VISCOUNT DUNEDIN, *sometime a Lord of Appeal in Ordinary, died, aged* 92.

b 2

Oct. 8. GONNE ST. CLAIR PILCHER, ESQ., M.C., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, in the place of Mr. Justice Langton, deceased, and was afterwards knighted.*

1943.
April 15. *This day* THE HON. SIR CHRISTOPHER JOHN WICKENS FARWELL, *a Justice of His Majesty's High Court of Justice, Chancery Division, died, aged* 65.

May 1. LIONEL LEONARD COHEN, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Farwell, deceased, and was afterwards knighted.*

May 5. *This day* THE RIGHT HON. VISCOUNT HEWART, *sometime Lord Chief Justice of England, died, aged* 73.

Dec. 20. *This day* THE HON. SIR CHARLES ALAN BENNETT, *a Justice of His Majesty's High Court of Justice, Chancery Division, died, aged* 66.

1944.
Jan. 11. HARRY BEVIR VAISEY, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Bennett, deceased, and was afterwards knighted.*

March 7. HUBERT JOSEPH WALLINGTON, ESQ., K.C., ALFRED THOMPSON DENNING, ESQ., K.C., and HENRY WILLIAM BARNARD, ESQ., K.C., *were appointed Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, and were afterwards knighted.*

March 9. *This day* THE RIGHT HON. SIR LANCELOT SANDERSON, *sometime a member of the Judicial Committee of the Privy Council, died, aged* 80.

April 18. FRANCIS RAYMOND EVERSHED, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Simonds, and was afterwards knighted.*

April 18. THE HON. SIR GAVIN TURNBULL SIMONDS, *a Justice of His Majesty's High Court of Justice, Chancery Division, was appointed to be a Lord of Appeal in Ordinary, in succession to The Right Hon. Lord Romer, resigned, and was granted the dignity of a Baron of the United Kingdom by the name, style and title of Baron Simonds of Sparsholt in the County of Southampton.*

June 25. *This day* THE RIGHT HON. LORD ATKIN, *a Lord of Appeal in Ordinary, died, aged* 76.

June 26. *The Dignity of a Baron of the United Kingdom was conferred upon* SIR CLAUD SCHUSTER, G.C.B., C.V.O., K.C., *Clerk of the Crown in Chancery and Permanent Secretary to the Lord Chancellor, by the name, style and title of Baron Schuster of Cerne in the County of Dorset.*

July 18. THE HON. SIR GEOFFREY LAWRENCE, *a Justice of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal in succession to The Right Hon. Lord Goddard, appointed Lord of Appeal in Ordinary.*

July 19. THE RIGHT HON. SIR RAYNER GODDARD, *a Lord Justice of Appeal. was appointed to be one of the Lords of Appeal in Ordinary, in succession to The Right Hon. Lord Atkin, deceased, and was granted the dignity of Baron of the United Kingdom by the name, style and title of Baron Goddard of Aldbourne, in the County of Wilts.*

July 19. GEORGE JUSTIN LYNSKEY, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of Mr. Justice Lawrence, and was afterwards knighted.*

Aug. 19. *This day* THE RIGHT HON. LORD ROMER, *sometime a Lord of Appeal in Ordinary, died, aged* 78.

Sept. 28. *This day* THE RIGHT HON. SIR ARTHUR FAIRFAX CHARLES CORYNDON LUXMOORE, *a Lord Justice of Appeal, died, aged* 68.

Oct. 11. THE HON. SIR FERGUS DUNLOP MORTON, M.C., *a Justice of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal in succession to Lord Justice Luxmoore, deceased.*

Oct. 17. THE HON. CHARLES ROBERT RITCHIE ROMER, K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Morton, and was afterwards knighted.*

Oct. 28. THE RIGHT HON. SIR GEORGE CLAUS RANKIN, *resigned his membership of the Judicial Committee of the Privy Council.*

Oct. 28. SIR JOHN WILLIAM FISHER BEAUMONT, K.C., *was appointed a member of the Judicial Committee of the Privy Council, in succession to the Right Hon. Sir George Claus Rankin, retired.*

1945.
Feb. 4. *This day* THE RIGHT HON. LORD FAIRFIELD, *sometime a Lord Justice of Appeal, died, aged* 81.

March 1. *This day* THE RIGHT HON. SIR SIDNEY ROWLATT, *sometime a Justice of His Majesty's High Court of Justice and a member of the Judicial Committee of the Privy Council, died, aged* 82.

March 27. *This day* THE RIGHT HON. SIR SHADI LAL, *sometime a member of the Judicial Committee of the Privy Council, died, aged* 70.

May 29. SIR DAVID MAXWELL FYFE, K.C., *Solicitor-General, was appointed Attorney-General in the place of The Right Hon. Sir Donald Somervell, K.C., who was appointed Home Secretary.*

May 29. SIR WALTER MONCKTON, K.C.M.G., K.C.V.O., M.C., K.C., *was appointed Solicitor-General in the place of Sir David Maxwell Fyfe, K.C.*

June 30. *This day* THE RIGHT HON. WILLIAM VISCOUNT FINLAY, K.B.E., *a Lord Justice of Appeal, died, aged* 69.

July 28. THE RIGHT HON. SIR WILLIAM ALLEN JOWITT, K.C., *received the Great Seal and took the oath of Office as Lord High Chancellor of Great Britain, in succession to The Right Hon. Viscount Simon.*

Aug. 2. *The dignity of Baron of the United Kingdom was conferred upon* THE RIGHT HON. SIR WILLIAM ALLEN JOWITT, *Lord High Chancellor of Great Britain, by the name, style and title of Baron Jowitt of Stevenage in the County of Hertford.*

Aug. 4. HARTLEY WILLIAM SHAWCROSS, ESQ., K.C., *was appointed Attorney-General, in the place of Sir David Maxwell Fyfe, K.C., and was afterwards knighted.*

Aug. 4. FRANK SOSKICE, ESQ., *was appointed Solicitor-General, in the place of Sir Walter Monckton, K.C.M.G., K.C.V.O., M.C., K.C., and was afterwards knighted.*

Oct. 24. THE HON. SIR FREDERICK JAMES TUCKER, *a Justice of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal.*

Oct. 24. THE HON. SIR ALFRED THOMPSON DENNING, *a Justice of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was transferred to the King's Bench Division, in the place of Mr. Justice Tucker.*

Oct. 24. HIS HONOUR AUSTIN ELLIS LLOYD JONES, *Judge of the County Court at Westminster, was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division in the place of Mr. Justice Denning, and was afterwards knighted.*

Nov. 11. *This day* SIR EDWARD ACTON, *sometime a Justice of His Majesty's High Court of Justice, King's Bench Division, died, aged* 80.

Nov. 17. THE HON. SIR STEPHEN OGLE HENN COLLINS, *a Justice of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was transferred to the King's Bench Division.*

Nov. 17. LAURENCE AUSTIN BYRNE, ESQ., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division in the place of Mr. Justice Henn Collins, and was afterwards knighted.*

Dec. 3. THE HON. SIR ALFRED TOWNSEND BUCKNILL, O.B.E., *a Justice of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was appointed to be one of the Lords Justices of Appeal.*

Dec. 3. HENRY GORDON WILLMER, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, in the place of Mr. Justice Bucknill, and was afterwards knighted.*

Dec. 12. JOHN WILLIAM MORRIS, ESQ., C.B.E., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

1946.

Jan 1. THE HON. SIR TRAVERS HUMPHREYS, *a Justice of His Majesty's High Court of Justice, King's Bench Division, was by His Majesty's command sworn of His Majesty's Most Honourable Privy Council and took his place at the Board accordingly.*

Jan. 9. THE HON. SIR AUGUSTUS ANDREWES UTHWATT, *a Justice of His Majesty's High Court of Justice, Chancery Division, was appointed to be a Lord of Appeal in Ordinary in succession to the Right Hon. Lord Russell of Killowen, resigned, and was granted the dignity of a Baron of the United Kingdom under the name, style and title of Baron Uthwatt of Lathbury in the County of Buckingham.*

Jan. 9. RONALD FRANCIS ROXBURGH, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Uthwatt, and was afterwards knighted.*

Jan. 21. THE RIGHT HON. LORD GODDARD, *a Lord of Appeal in Ordinary, was appointed Lord Chief Justice of England, in the place of the Right Hon. Viscount Caldecote, resigned.*

Jan. 23. *This day* THE RIGHT HON. SIR FRANK DOUGLAS MACKINNON *a Lord Justice of Appeal, died, aged* 74.

Feb. 1. THE RIGHT HON. SIR DONALD BRADLEY SOMERVELL, K.C., *sometime Attorney-General, was appointed to be one of the Lords Justices of Appeal, in succession to Lord Justice MacKinnon, deceased.*

Feb. 5. THE RIGHT HON. SIR HERBERT DU PARCQ, *a Lord Justice of Appeal, was appointed to be a Lord of Appeal in Ordinary, in succession to The Right Hon. Lord Goddard, and was granted the dignity of Baron of the United Kingdom, by the name, style and title of Baron du Parcq of Grouville.*

Feb. 13. THE HON. SIR LIONEL LEONARD COHEN, *a Justice of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal.*

Feb. 13. HENRY WYNN-PARRY, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Cohen, and was afterwards knighted.*

Feb. 13. THE HON. SIR CYRIL ASQUITH, a *Justice of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal.*

Feb. 13. FREDERICK AKED SELLERS, ESQ., M.C., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of Mr. Justice Asquith, and was afterwards knighted.*

March 15. *This day* LORD CLAUSON OF HAWKSHEAD, *sometime a Lord of Appeal in Ordinary, died, aged* 76.

April 5. THE RIGHT HON. SIR GEORGE CLAUS RANKIN, *sometime a member of the Judicial Committee of the Privy Council, died, aged* 69.

June 8. THE RIGHT HON. SIR JOHN EDWARD POWER WALLIS, *sometime a member of the Judicial Committee of the Privy Council, died, aged* 84.

June 10. SIR HARTLEY WILLIAM SHAWCROSS, K.C., *Attorney-General, was by His Majesty's Command sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Aug. 17. *This day* THE RIGHT HON. LORD BLANESBURGH OF ALLOA, *sometime a Lord of Appeal in Ordinary, died, aged* 85.

Dec. 21. *This day* THE RIGHT HON. LORD RUSSELL OF KILLOWEN, *sometime a Lord of Appeal in Ordinary, died, aged* 79.

Dec. 21. *This day* THE RIGHT HON. SIR JOHN ELDON BANKES, G.C.B., *sometime a Lord Justice of Appeal, died, aged* 92.

1947.

Jan. 1. THE RIGHT HON. SIR GEOFFREY LAWRENCE, D.S.O., *a Lord Justice of Appeal, was created a Baron of the United Kingdom by the name, style and title of Baron Oaksey, of Oaksey, in the County of Wilts.*

Jan. 1. THE RIGHT HON. WILLIAM ALLEN, BARON JOWITT, *Lord High Chancellor of Great Britain, was created a Viscount.*

Feb. 10. THE HON. SIR LAWRENCE AUSTIN BYRNE, *one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was transferred to the King's Bench Division, in the place of Mr. Justice Charles.*

Feb. 10. HIS HONOUR DONALD LESLIE FINNEMORE, *Judge of the County Court Circuit* 25, *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, in the place of Mr. Justice Byrne, and was afterwards knighted.*

April 5. THE HON. SIR ERNEST BRUCE CHARLES, *a Justice of His Majesty's High Court of Justice, King's Bench Division, retired.*

April 5. THE RIGHT HON. JOHN CLARKE MACDERMOTT, M.C., *Judge of His Majesty's High Court of Justice of Northern Ireland, was appointed to be one of the Lords of Appeal in Ordinary in succession to The Right Hon. Lord Wright, retired, and was granted a dignity of a Baron of the United Kingdom, by the name, style and title of Baron MacDermott of Belmont.*

April 15. THE RIGHT HON. LORD OAKSEY, *a Lord Justice of Appeal, was appointed to be a Lord of Appeal in Ordinary.*

April 15. THE HON. SIR FREDERIC JOHN WROTTESLEY, *a Justice of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal in successtion to Lord Oaksey.*

April 15. FRED EILLS PRITCHARD, ESQ., M.B.E., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of Mr. Justice Wrottesley, and was afterwards knighted.*

April 18. THE RIGHT HON. SIR FERGUS DUNLOP MORTON, *a Lord Justice of Appeal, was appointed to be a Lord of Appeal in Ordinary and was granted the dignity of a Baron of the United Kingdom by the name, style and title of Baron Morton of Henryton.*

April 22. THE HON. SIR FRANCIS RAYMOND EVERSHED, *a Justice of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal, in succession to The Right Hon. Lord Morton.*

April 22. DAVID LLEWELYN JENKINS, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Evershed, and was afterwards knighted.*

June 10. THE HON. SIR WILLIAM NORMAN BIRKETT, *a Justice of His Majesty's High Court of Justice, King's Bench Division, was by His Majesty's command sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Oct. 5. THE HON SIR MALCOLM MARTIN MACNAGHTEN, K.B.E., *a Justice of His Majesty's High Court of Justice, King's Bench Division, retired.*

Oct. 5. GEOFFREY HUGH BENBOW STREATFEILD, ESQ., M.C., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of Mr. Justice Macnaghten, and was afterwards knighted.*

Oct. 11. *This day* THE RIGHT HON. VISCOUNT CALDECOTE, *sometime Lord Chief Justice of England, died, aged 71.*

Dec. 12. CHARLES EUSTACE HARMAN, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, and was afterwards knighted.*

Dec. 12. THE RIGHT HON. LORD NORMAND, *Lord Justice General of Scotland and Lord President of the Court of Session, Scotland, was appointed to be a Lord of Appeal in Ordinary, in the place of Lord Macmillan, retired, and was granted the dignity of a Baron of the United Kingdom by the name, style and title of Baron Normand of Aberdour.*

1948.

Jan. 1. THE HON. SIR MALCOLM MARTIN MACNAGHTEN, K.B.E., *sometime a Justice of His Majesty's High Court of Justice, was by His Majesty's command sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

May 24. THE HON. SIR CYRIL ATKINSON, *a Justice of His Majesty's High Court of Justice, King's Bench Division, retired.*

May 25. THE HON. SIR AUSTIN ELLIS LLOYD JONES, *one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was transferred to the King's Bench Division, in the place of Sir Cyril Atkinson.*

May 25. HIS HONOUR BENJAMIN ORMEROD, *Judge of the County Court, Circuit* 14, *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, in the place of Mr. Justice Austin Jones, and was afterwards knighted.*

June 3. THE HON. SIR STEPHEN OGLE HENN COLLINS, C.B.E., *a Justice of His Majesty's High Court of Justice, King's Bench Division, retired,*

June 13. *This day* THE RIGHT HON. BARON THANKERTON OF THANKERTON. *sometime a Lord of Appeal in Ordinary, died, aged 74.*

June 14. GERALD OSBORNE SLADE, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of Mr. Justice Henn Collins, and was afterwards knighted.*

Sept. 8. THE RIGHT HON. SIR FREDERIC JOHN WROTTESLEY, *a Lord Justice of Appeal, retired.*

Sept. 24. THE RIGHT HON. JAMES SCOTT CUMBERLAND REID, K.C., *Dean of Faculty of Advocates in Scotland, was appointed to be a Lord of Appeal in Ordinary, and was granted the dignity of a Baron of the United Kingdom by the name, style and title of Baron Reid of Drem.*

Oct. 5. THE RIGHT HON. SIR LESLIE FREDERIC SCOTT, *a Lord Justice of Appeal, retired.*

Oct. 11. THE HON. SIR DONALD LESLIE FINNEMORE, *one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was transferred to the King's Bench Division.*

Oct. 14. EDWARD HOLROYD PEARCE, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, in the place of Mr. Justice Finnemore, and was afterwards knighted.*

Oct. 14. PATRICK ARTHUR DEVLIN, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of Mr. Justice Denning, and was afterwards knighted.*

Oct. 14. THE HON. SIR ALFRED THOMPSON DENNING, *a Justice of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal in succession to Lord Justice Wrottesley.*

Oct. 14. THE HON. SIR JOHN EDWARD SINGLETON, *a Justice of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal in succession to Lord Justice Scott.*

Nov. 14. *This day* THE RIGHT HON. SIR FREDERIC JOHN WROTTESLEY, *sometime a Lord Justice of Appeal, died, aged* 68.

1949.

April 24. *This day* THE RIGHT HON. BARON UTHWATT OF LATHBURY, *a Lord of Appeal in Ordinary, died, aged* 69.

April 27. *This day* THE RIGHT HON. BARON DU PARCQ OF GROUVILLE, *a Lord of Appeal in Ordinary, died, aged* 68.

June 1. SIR CYRIL JOHN RADCLIFFE, G.B.E., K.C., *was appointed to be one of the Lords of Appeal in Ordinary and was granted the dignity of a Baron of the United Kingdom, by the name, style and title of Baron Radcliffe of Werneth.*

June 1. THE RIGHT HON. LORD GREENE, *Master of the Rolls, was appointed a Lord of Appeal in Ordinary.*

June 1. THE RIGHT HON. SIR FRANCIS RAYMOND EVERSHED, *a Lord Justice of Appeal, was appointed to be Keeper or Master of the Rolls and Records of the Chancery of England, in succession to the Right Hon. Lord Greene.*

June 1. THE HON. SIR DAVID LLEWELYN JENKINS, *one of the Justices of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal in succession to Lord Justice Evershed.*

June 1. HAROLD OTTO DANCKWERTS, ESQ., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of Mr. Justice Jenkins, and was afterwards knighted.*

1950.

Jan. 2. GEORGE HAROLD LLOYD-JACOB, ESQ., K.C., *was appointed one of the Justices of His Majesty's High Court of Justice, Chancery Division, and was afterwards knighted.*

March 15. *This day* THE HON. SIR WILFRID HUBERT POYER LEWIS, *one of the Justices of His Majesty's High Court of Justice, King's Bench Division, died, aged* 69.

March 27. THE HON. HUBERT LISTER PARKER, *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

May 3. *This day* THE HON. SIR ERNEST BRUCE CHARLES, C.B.E., *sometime a Justice of His Majesty's High Court of Justice, King's Bench Division, died, aged* 78.

May 5. THE RIGHT HON. LORD GREENE OF HOLMBURY ST. MARY, *a Lord of Appeal in Ordinary (sometime Master of the Rolls), resigned.*

May 19. *This day* THE RIGHT HON. SIR LESLIE FREDERIC SCOTT, *sometime a Lord Justice of Appeal, died, aged* 80.

June 6. THE HON. SIR BENJAMIN ORMEROD, *one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was transferred to the King's Bench Division.*

June 6. HIS HONOUR CHARLES ARTHUR COLLINGWOOD, *Judge of the County Court, Circuit* 48, *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, in place of Mr. Justice Ormerod, and was afterwards knighted.*

June 6. WILLIAM GORMAN, ESQ., K.C., *was appointed one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

July 8. PATRICK REDMOND JOSEPH BARRY, ESQ., M.C., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

July 10. TERENCE NORBERT DONOVAN, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

August 16. *This day* THE RIGHT HON. LORD HAILSHAM, *sometime Lord High Chancellor of Great Britain, died, aged* 78.

Sept. 29. THE RIGHT HON. SIR FREDERICK JAMES TUCKER, *a Lord Justice of Appeal, was appointed to be one of the Lords of Appeal in Ordinary, in succession to The Right Hon. Lord Greene, resigned, and was granted the dignity of a Baron of the United Kingdom by the name, style and title of Baron Tucker of Great Bookham in the County of Surrey.*

Sept. 30. THE HON. SIR WILLIAM NORMAN BIRKETT, *a Justice of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal, in succession to Lord Justice Tucker.*

Oct. 2. SIR WILLIAM LENNOX MCNAIR, K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division.*

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1950, will be as follows :—

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ABBREVIATIONS.

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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1677

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1927

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CEYLON

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Emergency Regulations, 1948, *reg.* 4, *sub-reg.* 1 (*a*) (*b*); *reg.* 33, *sub-reg.* 1. SAMBASIVAM *v.* PUBLIC PROSECUTOR, FEDERATION OF MALAYA **J. C. 458**

Emergency (*Criminal Trials*) *Regulations*, 1948, *regs.* 7, 11. SAMBASIVAM *v.* PUBLIC PROSECUTOR, FEDERATION OF MALAYA - - **J. C. 458**

Straits Settlements Criminal Procedure Code, 1910 (*as amended by Or. No. XIII of* 1938), *s.* 302. MOHINDAR SINGH *v.* THE KING - - **J. C. 345**

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[PRIVY COUNCIL]

J. C.*

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Oct. 12.

PROVINCIAL TREASURER OF MANITOBA APPELLANT;

AND

WM. WRIGLEY JR. COMPANY LIMITED RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA

Canada — Manitoba — Revenue — Income tax — Company — Assessment—Allowance—Appeal—" Matter of the appeal "—Jurisdiction of court to ascertain net profit—Manitoba Income Taxation Act, R.S.M. 1940, *c.* 209, *ss.* 24, 58, 60.

The respondent company, a Dominion company with its head office and manufacturing plant in Ontario and a branch office and a warehouse in Manitoba in which chewing gum, manufactured in Ontario, was stored for sale and distribution, objected to the amount at which it was assessed to income tax in Manitoba on its profits from sales in that Province, and claimed that it was entitled to an allowance for " manufacturing profit " in Ontario. Having served on the appellant, the Provincial Treasurer of Manitoba, the notice of appeal required by s. 58 of the Manitoba Income Taxation Act, R.S.M. 1940, c. 209, and he having refused to allow the objection, the respondent company appealed, under s. 60 of the Act, to a judge of the Court of King's Bench, who,

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**Present:* LORD GREENE, LORD MORTON OF HENRYTON, LORD MACDERMOTT, LORD REID and LORD RADCLIFFE.

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by sub-s. 2 of s. 60 is directed to hear the appeal and the evidence adduced before him by the appellant and the Crown and to "decide the matter of the appeal."

Held, that the "matter of the appeal" which was thus brought before the judge comprised both the question of law whether there should be an allowance for "manufacturing profit" and the question of fact what, if there ought to be such an allowance, the net profit or gain in Manitoba was to be treated as being. Accordingly, where the judge, having held that the respondent company was entitled to an allowance for "manufacturing "profit," had by his order adjudged and declared what was the figure of net profit of the respondent company in Manitoba for each of the relevant years and had referred the matter back to the appellant with a direction that he should assess the respondent on that basis, the order was within his jurisdiction.

Order of the Supreme Court of Canada [1947] S. C. R. 431, affirmed.

APPEAL (No. 46 of 1948), by special leave, from a judgment of the Supreme Court of Canada (June 18, 1947) allowing an appeal by the respondent from a judgment of the Court of Appeal for Manitoba (September 19, 1945) and restoring a judgment of the Court of King's Bench in Manitoba (March 10, 1943) which the Court of Appeal for Manitoba had reversed.

The respondent, Wm. Wrigley Jr. Company, Ld., was a Dominion company which had its head office and manufacturing plant in Ontario and a branch office and warehouse in Manitoba. In the Manitoba warehouse was stored chewing gum manufactured in Ontario and from the stocks of that warehouse were filled orders for chewing gum which were obtained from customers not only in Manitoba but also in Alberta, Saskatchewan, and parts of Ontario itself. While the orders in respect of such sales were received by the respondent's branch office in Manitoba, payment for the chewing gum supplied was made to the respondent's head office in Ontario.

The appellant, the Provincial Treasurer of Manitoba, having made assessments to income tax on the respondent in respect of the years 1936-39 inclusive, the respondent objected to the amount of its assessment, claiming, and the appellant refusing to concede, that it was entitled to an allowance for "manufacturing profit" in Ontario. Thereupon, under s. 60 of the Manitoba Income Taxation Act, R. S. M. 1940, c. 209, the respondent appealed to the Court of King's Bench, Manitoba, which, by sub-s. 2 of s. 60 is directed to "decide "the matter of the appeal."

The Court of King's Bench (Major J.) held that the respondent was entitled to an allowance for "manufacturing "profit," and set aside the assessments, and by his order adjudged and declared what was the figure of net profit or gain of the respondent in Manitoba for each of the years in question and referred the matter back to the appellant with a direction that he should assess the respondent on that basis.

The Court of Appeal for Manitoba (McPherson C.J.M., Dennistoun and Bergman JJ.A., Trueman and Dysart JJ.A. dissenting) reversed that decision, which, however, on further appeal, was restored by the Supreme Court of Canada (Rinfret C.J.C., Taschereau and Estey JJ., Rand and Kellock JJ. dissenting).

1949. July 25, 27, 28. *Glynn Cousley K.C.* (of the Canadian Bar) and *Gahan* for the appellant. So far as the question of law is concerned, i.e., whether the respondent company is entitled to an allowance for "manufacturing profit," that was decided in principle against the present appellant's contention by the judgment of this Board in *International Harvester Company of Canada Ld.* v. *Provincial Tax Commission* (1). The appellant's only point in this appeal, therefore, is that the Minister is the proper person to make the apportionment of the assessment, and the appeal is in effect from the last part of the judgment of Major J. in the King's Bench Court which assumes that the court has the power of apportionment, whereas the case for the appellant is that the whole matter of apportionment is in the hands of the Provincial Treasurer. There is no mention in the judgment of the Supreme Court of the question whether the court or the Minister should make the apportionment. Once the court has held that an apportionment is required under s. 24 of the Manitoba Taxation Act, then it is a practical matter for the administrative officers to decide what particular formula should be evolved to carry out the order. It would not be a general scheme of taxation if under ss. 26, 27 and 27A the power of apportionment was given to the Minister whereas under s. 24 it would be given to the courts. Section 24 should be interpreted in the light of the above sections. The whole Act was built on the discretion being given to the Minister. There must be a specific power given to the court, otherwise it could not act in the matter. There is only one place in the Act where there is a

(1) [1949] A. C. 36.

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discretionary power given to the court or a judge, and that is as to costs : s. 60. That strengthens the argument that if the legislature had meant that the court should have this power it would have said so. Further, the legislature has given wide discretionary powers to the Minister in other matters and to no one else : s. 47. The formula which was in fact employed by the judge was evolved in the course of the hearing and has never been before the Provincial Treasurer. The formula of apportionment is something for the Minister to determine, not the court ; it is a very intricate operation, and has to be determined by some person who has the broad picture of taxation. There is very little case law on the matter—only two or three cases—and in none of them has the court decided the formula of apportionment ; they have stopped short of saying that apportionment should be within the province of the tribunal: the *International Harvester Company's* case (1) ; *Commissioners of Taxation* v. *Kirk* (2) ; *Underwood Typewriter Co.* v. *Chamberlain* (3), and *Minister of National Revenue* v. *Wrights' Canadian Ropes Ld.* (4). And in the present case Dysart J. in the Manitoba Court of Appeal said in his judgment that " the trial judge himself made a finding of the amount " of the tax, and in the formal judgment directs that the " Minister adopt it. He exceeded his powers I think in so " directing—he invaded the field which the Act assigns " exclusively to the Minister."

Gahan followed.

Everett Bristol K.C. (of the Canadian Bar) and *Stephen Chapman* for respondent company. The appellant should not be permitted to raise here a point not taken or argued by him in the courts below, namely, whether the trial judge erred in himself ascertaining the amount of the taxable income instead of referring it back to the Minister to do this. The trial judge had the power and the duty under s. 60 to determine the amount of the taxable income, i.e., the net profit or gain arising from the company's business in Manitoba. Section 60, sub-s. 2, empowered the judge to " decide the matter of the " appeal." Section 58 gives the right of appeal to the taxpayer to object to the amount at which he was assessed. In other words, the assessment constitutes the matter on appeal. The finding of the trial judge as to what was the amount of the taxable income in each year is a finding of fact, and should

(1) [1949] A. C. 36.
(2) [1900] A. C. 588.
(3) (1920) 254 U. S. 113.
(4) [1947] A. C. 109.

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not be disturbed unless he has proceeded on some wrong principle of law: *International Harvester Company of Canada* v. *Provincial Tax Commission* (1).

Stephen Chapman followed. It is said for the appellant that s. 24 imports a discretion. It is not legitimate to import into a taxing section words which are not there.

Glynn Cousley K.C. replied.

Oct. 12. The judgment of their Lordships was delivered by LORD RADCLIFFE. This is an appeal from a judgment of the Supreme Court of Canada, dated June 18, 1947. The Supreme Court judgment had reversed a judgment of the Court of Appeal for the Province of Manitoba, dated September 19, 1945, and by so doing had restored a judgment of the Court of King's Bench in Manitoba, dated March 10, 1943. The purpose of the appeal to their Lordships therefore is to upset the judgment of the Court of King's Bench.

The proceedings originated with an appeal by the respondent under the appellate procedure provided by the Income Taxation Act of Manitoba. A part of the respondent's business being carried on in Manitoba and the respondent being a corporation or joint stock company, the head office of which was outside the Province, the appellant made assessments to income tax on the respondent in respect of the years 1936–39 inclusive. The respondent objected to these assessments as being excessive in amount, and, so objecting, put in motion the procedure provided by the Act, first by serving a notice of appeal on the appellant himself and then, on the appellant refusing to allow the objection and to reduce the assessments, by appealing to the Court of King's Bench under s. 29 of the Income Taxation Act that was then in force.

There is no dispute as to what was in issue between the parties or as to the facts to which the issue related. [His Lordship then stated the facts set out above and continued :] Plainly such a course of business raises questions as to the ascertainment of the profit arising in Manitoba similar to the questions which were recently answered by this Board in *International Harvester Company of Canada Ld.* v. *Provincial Tax Commission* (1). In the present case the respondent has maintained throughout that in the assessment of its profits in Manitoba under the Act an allowance should be made for "manufacturing profit" in Ontario. Except in argument before this Board the appellant has consistently maintained that no such allowance should be made to the taxpayer and that " the net profits arising from sales in Manitoba are taxable " in Manitoba." Phrases such as " allocation of profits " or " apportionment of profits " have been used from time to time in the course of the controversy, but in substance what the appellant was insisting on, and what the respondent was challenging, was that the whole net profit from a sale in Manitoba ought to be treated as arising from the business in Manitoba, with the consequence that no part of that profit could be treated as arising from the part of the business that consisted of manufacturing and other activities in Ontario. For the purposes of this appeal there is no necessity to go further into the dispute on this question of principle between the taxpayer and the taxing authority, for it is in all material respects the same point as was decided by this Board in the *International Harvester Co.* case (1). Section 21 (*a*) of the Saskatchewan Income Tax Act is the equivalent of s. 24 of the Income Taxation Act of Manitoba, under which the respondent's assessment was made. (The parties have throughout referred to the relevant sections according to the language and numbering of the Revised Statutes of Manitoba, 1940, c. 209, and it is convenient to adhere to this course.) And the scheme of the Saskatchewan Act is for this purpose the same as the scheme of the Manitoba Act. Consequently, the decision in the *International Harvester Co.* case (1), which was made known after the Supreme Court of Canada had delivered their judgments on the appeal in this case, concluded the issue between the appellant and the respondent in favour of the latter. The view which Major J. had taken when the case was before him in the Court of King's Bench in Manitoba and the view which had commended itself to the majority of the learned judges in the Supreme Court coincided with that approved by their Lordships in the *International Harvester Co.* case (1). Therefore the appeal as conducted before this Board proceeded on the basis that it was not open to the appellant's counsel to ask that the order of the Supreme Court from which he was appealing should be set aside on the ground that the respondent was not in law entitled to be allowed a " manufac- " turing profit " outside Manitoba in the ascertainment of his profits in Manitoba. The main, and hitherto the only, issue in controversy between the parties thus disappeared.

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(1) [1949] A. C. 36, 55.

The submission that was made to their Lordships on behalf of the appellant was based on quite a different argument. Attention was directed to the form of the order which Major J. had made when allowing the respondent's appeal in the Court of King's Bench. Not only had he allowed the appeal and set aside the assessments and the appellant's decisions which had affirmed them—this, it was conceded, was within the power of the court—but he had also gone on by his order to adjudge and declare what was the figure of net profit or gain of the respondent for each of the years in question, and had referred the matter back to the appellant with a direction that he should assess the respondent on that basis. The court, it was said, had no jurisdiction enabling it thus to arrive at an actual figure of assessable income or to direct the appellant to adopt it. To do this was to invade the administrative function of the appellant, as the responsible Minister, and to force on him the application of a particular formula for reducing the total profit to the assessable profit which he neither had adopted nor might, when he came to consider the matter, think it right to adopt. And it followed, said the appellant's counsel, that, if Major J. exceeded his jurisdiction in the form of order that he made, then the order of the Supreme Court which had restored his order without alteration was wrong in law and ought to be reversed.

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(1) [1949] A. C. 36

Their Lordships propose in this case to express their opinion of this argument on its merits. But it is right to note that when counsel for the respondent came to address their Lordships he raised the objection that the argument ought not to be entertained, whatever its merits, since it was being advanced as a ground of appeal before this Board without having been relied on in any of the courts below. The facts to which he drew attention in support of his objection make a formidable list. It will be convenient to notice them in order. Firstly, the hearing before the judge in the Court of King's Bench had been occupied wholly with the question of principle whether " manufacturing profit " should be allowed or not: in the course of the hearing one of the respondent's witnesses had put forward a formula for ascertaining the profit, if " manufacturing profit " was to be allowed, and no objection had been taken to the admissibility of such evidence : no alternative formula had been put forward by the appellant, and his witness, Mr. Lowery, the Provincial Inspector of Income Tax in charge of the administration of assessments, stated in evidence that, if there had to be apportionment of profit, he was "quite satisfied to leave it to the court." Secondly, after the judge had given his reasons for allowing the appeal, at the close of which he said "in the absence of any other "formula or failure to exercise the powers given to the Minister "as above indicated I direct that it" [the formula put forward by the respondent's witness] "shall be applied," the representatives of the two parties worked out the relevant figures on the basis of this formula and by agreement of counsel inserted them in the order of the court, the terms of which they in fact settled and agreed. Thirdly, the appellant's notice of appeal to the Court of Appeal for Manitoba contains no ground of appeal that can be read as an objection to the judge's order in point of form or jurisdiction. In the circumstances this is not surprising. Fourthly, it is not mentioned in the appellant's factum for the Supreme Court. Fifthly, it was not mentioned in the appellant's petition to this Board for special leave to appeal, nor does the Order in Council granting the leave make any reference to the existence of such an issue.

These considerations do indeed present a strong argument for the Board to refuse to entertain an appeal which has this issue as its only ground. In effect the appellant, now that the question of principle on which he has hitherto fought the case has been decided contrary to his contention, is seeking at this late stage to raise a new ground which he has not presented to the courts below. The result is that their Lordships are invited to decide the matter without the assistance of any observations bearing on it in the judgments of the learned judges of the Supreme Court; and such allusions as are made to it in some of the judgments in the Court of Appeal of Manitoba certainly do not suggest that any substantive issue was argued before that court as to Major J.'s jurisdiction to make the order that he did. But the point has now been fully argued before their Lordships; and this is not a case in which the respondent has been in any way taken by surprise by the presentation of the argument, since it is the same as that propounded by Dysart J. in the Manitoba Court of Appeal. Their Lordships, having considered the appellant's argument, do not agree with it and, since Major J.'s order has been restored by the Supreme Court without any explicit reference to this point, it appeared to their Lordships that the balance of public advantage in this case inclined towards their entertaining the appeal on this new ground and stating their reasons for thinking that it ought not to succeed. This they now proceed to do. But they think it well to add a reminder that the course that they have taken on this occasion is not a precedent for allowing an appeal to succeed on another occasion in any comparable circumstances.

The section of the Manitoba Income Taxation Act under which the respondent's assessment has been made is by common consent s. 24, which runs as follows :—

" 24.—(1.) The income liable to taxation under this Part " of every person residing outside of Manitoba, who is carrying " on business in Manitoba, either directly or through or in the " name of any other person, shall be the net profit or gain " arising from the business of such person in Manitoba.

" (2.) This section shall apply to a taxpayer which is a " corporation or joint stock company carrying on business in " Manitoba and which has not its head office in Manitoba."

The problem involved in ascertaining the taxable income under this section is the problem of ascertaining what is the net profit or gain that arises from the business in Manitoba. Where a corporation that is within the section sells in Manitoba a product that it has manufactured without Manitoba it follows from the decision in the *International Harvester Co.* case (1) that the net taxable profit is to be ascertained after making an allowance for " manufacturing profit " to be attributed to the manufacturing activity outside the Province. It is this allowance that the assessments appealed against refused to concede.

What, then, is the purpose and scope of the statutory right of appeal under the Act ? For that, one must resort to the appeal provisions of the Act. Under s. 58 of the Act, " any " person who objects to the amount at which he is assessed " may serve a notice of appeal on the appellant. Under s. 59 the appellant must duly consider the same and either affirm or amend the assessment appealed against. Under s. 60, " if the person objecting is dissatisfied with the decision " of the appellant, he has the right to appeal to a judge of the Court of King's Bench by a notice which is to set out the grounds of his appeal. By sub-s. 2 of the same section the judge is directed to hear the appeal and the evidence adduced before him by the appellant and the Crown and to " decide the matter of the appeal." If that procedure is

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applied to the facts of the present case, what happened was that the respondent objected to the amount of its assessments. It claimed, and the appellant refused to concede, that it was entitled to an allowance for " manufacturing profit." Thereupon the respondent appealed to the Court of King's Bench claiming that for this reason the assessments made on it were too large. In their Lordships' view the " matter of the " appeal " which was thus brought before the judge comprised both the question of law whether there should be an allowance for " manufacturing profit " and the question of fact what, if there ought to be such an allowance, the net profit or gain in Manitoba was to be treated as being. The judge's order decided no more than this, and their Lordships are of opinion that it was within his jurisdiction so to decide.

It is true that the judge, having decided the question of principle that was in controversy, might have remitted the matter to the appellant to make new assessments on that basis. At least, their Lordships will assume that he had power so to deal with an appeal. But, while it is clear that he was under no obligation to remit, it is not clear what advantage would have been gained by so remitting. A new assessment would have produced a new right of appeal, if the amount of the assessment was objected to, and the judge would only have had to consider on a second occasion the propriety of a calculation of " manufacturing profit " which he might just as well have considered on the first when the original appeal was before him. It was not, after all, his fault that on that occasion the appellant offered no evidence as to the basis of calculation which he would prefer if some basis had to be adopted, or that the Inspector of Taxes stated that he was quite satisfied to leave that matter to the court.

In truth, the appellant's objections to the form of the order invest him, as Minister, with a discretion that he does not possess. It is to no purpose to point out that under certain special sections, such as s. 26, s. 27 and s. 27A, there are express statutory provisions to the effect that a proportionate part of profit or income derived from specified activities in Manitoba is to be treated as earned in Manitoba, and that the appellant, as Minister, is to have full discretion as to the manner of determining such proportionate part. The statutory discretion that is conferred for the purpose of administering the taxation system under these sections cannot be imported by any method of construction into s. 24, which is the section

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in question here. Here the appeal from the assessments under that section reached the court without any discretion having been exercised in fact, or any statutory discretion conferred for the purpose of s. 24 existing in law. It is impossible, therefore, to attribute to the judge dealing with these appeals a position comparable to that which he might occupy if he were dealing with an appeal against an assessment under one of these special sections when the Minister had already exercised his discretion "as to the manner of determining" a proportionate part of certain income. Their Lordships express no view as to the range of the judge's power on such an appeal. What they are concerned to point out is that there is no useful analogy between such an appeal and those which are the subject of the present case.

For these reasons their Lordships think that the appeal must fail and they will humbly advise His Majesty accordingly. The appellant must pay the respondent's costs of the appeal.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Lee & Pembertons.*

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July 25;
Oct. 12.

BERENG GRIFFITH LEROTHOLI AND OTHERS . . . . APPELLANTS;

AND

THE KING . . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF BASUTOLAND.

Basutoland — Criminal law — Murder — Accomplice evidence — Admissibility — Corroboration — Statutory requirements — South African cautionary rule of practice applicable—Basutoland Criminal Procedure and Evidence Proclamation (*No.* 59 *of* 1938) (*as amended by the Criminal Procedure and Evidence* (*Amendment*) *Proclamation* (*No.* 12 *of* 1944)), *s.* 231.

By s. 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, as amended by the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation, 1944: "Any court which is trying any person on a charge of any offence

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**Present:* LORD SIMONDS, LORD NORMAND, LORD REID and SIR JOHN BEAUMONT.

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"may convict him of any offence alleged against him . . . . on "the single evidence of any accomplice: Provided that the "offence has, by competent evidence, other than the single and "unconfirmed evidence of the accomplice, been proved to the "satisfaction of such court to have been actually committed."

The proviso to s. 231 only requires additional evidence that an offence has been committed. Once that has been proved the proviso is satisfied, and there is no statutory requirement that additional evidence is necessary to prove the identity of the offenders. Section 231 therefore permits a court to convict on accomplice evidence alone once the proviso is satisfied by independent proof that a crime has been committed. While, however, a judge in Basutoland, as elsewhere, must always have in mind the danger of accepting accomplice evidence which is uncorroborated by independent evidence, the South African cautionary rule, as stated by Schreiner J.A. in *Rex* v. *Ncanana* (1948) 4 S. A. L. R. 399, at p. 405, which is different in some respects from the cautionary rule of English practice as laid down in *Rex* v. *Baskerville* [1916] 2 K. B. 658, is properly applicable in Basutoland.

Tumahole Bereng v. *The King* [1949] A. C. 253, not regarded as a decision that the law of Basutoland requires the application of the English cautionary rule and no other.

Where, therefore, at the trial of the eleven appellants on a charge of murder there was sufficient evidence independent of that of alleged accomplices to show that a crime had been committed, but that independent evidence only implicated one, or, at most, two of the eleven accused as having taken part in the alleged crime, and there was no evidence beyond that of the accomplices to show that any of the other accused had taken part in the crime, and the trial judge had present to his mind, and properly applied, the South African cautionary rule, there was no ground for interfering with the convictions of the appellants.

Judgment of the High Court of Basutoland affirmed.

Appeal (No. 6 of 1949), by special leave, from a judgment and sentence of the High Court of Basutoland (Sutton Ag. J.) (November 15, 1948) whereby the appellants were found guilty of, and sentenced to death for, the murder (alleged to be a ritual murder) on March 4, 1948, of one Meleke Ntai, a brother or cousin of one of the appellants, who was alleged to have sold Meleke Ntai for 100*l.* as "medicine."

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee. The main ground of the appeal was that there was no evidence, other than that of alleged accomplices, to prove that the crime of murder had actually been committed, and each of the appellants had given evidence denying all knowledge of the offence. It was submitted that the trial judge held, and in doing so misdirected himself, that one accomplice could corroborate another; that ruling, it was said, was contrary to the law applicable in Basutoland as subsequently laid down by the Judicial Committee of the Privy Council in *Tumahole Bereng* v. *The King* (1). It was further contended that in directing himself on the issues of accomplice evidence and corroboration the trial judge followed certain decisions of the South African courts and not those of the Supreme Court of Judicature in England.

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Dingle Foot and *Ralph Millner* for the appellants.
The Attorney-General for the High Commission Territories (*A. C. Thompson K.C.*) and *J. G. Le Quesne* for the Crown.

July 25. At the conclusion of the hearing Lord Simonds announced that their Lordships would humbly advise His Majesty that the appeal should be dismissed.

Oct. 12. LORD REID, giving their Lordships' reasons for dismissing the appeal, said: On November 15, 1948, in the High Court of Basutoland the appellants were found guilty of the murder of Meleke Ntai and sentenced to death. The principal evidence against them was the evidence of four accomplices, and the main ground of this appeal was that the learned judge who convicted the appellants misdirected himself in law in considering the evidence of the accomplices. The trial in this case took place before the decision of the Board in *Tumahole Bereng and Others* v. *The King* (1). It was admitted that the learned judge in this case properly applied the law as it was thought to be in Basutoland before that decision, but it was argued that if the grounds of decision in *Tumahole Bereng's* case (1) are applied in this case these convictions cannot stand. Their Lordships must therefore first consider what was decided in *Tumahole's* case (1).

The law in Basutoland with regard to accomplice evidence is enacted in s. 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938; that section was amended by the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation, 1944, and the amended section is as follows:—

(1) [1949] A. C. 253.

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"Any court which is trying any person on a charge of "any offence may convict him of any offence alleged against "him in the indictment or summons on the single evidence "of any accomplice:

"Provided that the offence has, by competent evidence, "other than the single and unconfirmed evidence of the "accomplice, been proved to the satisfaction of such court "to have been actually committed."

In *Tumahole's* case (1), as in this case, the crime alleged was a ritual murder; in *Tumahole's* case (1) their Lordships first considered whether there was any evidence in addition to the evidence of the accomplices to show that the deceased had been murdered, and they held that there was not. Their Lordships therefore proceeded to a consideration of the legal issues "on the basis that there was no evidence in the case "sufficient to confirm the two accomplices in proving, or to "prove aliunde, that Katse was murdered at all" (2). The foundation of their Lordships' judgment was that the expression "the single evidence of any accomplice" in s. 231 cannot be read as the equivalent of "the evidence of a single accomplice" but must read as meaning "the unsupported evidence of any "accomplice or accomplices" (3). So the proviso inserted by the amendment of 1944 requires that there must in addition to accomplice evidence be "additional proof that the offence "charged has been committed by somebody" (4). But the proviso only requires additional evidence that an offence has been committed. Once that has been proved the proviso is satisfied. There is no statutory requirement that additional evidence is necessary to prove the identity of the offenders. A conviction "cannot be impeached as beyond the powers "of the court solely on the ground that the only evidence "which implicated the appellants was the evidence of the "accomplices" (4). The first question in the present case must therefore be whether there is in this case evidence independent of the evidence of the accomplices which shows that a crime was committed by somebody.

The alleged murder in this case is said to have taken place during the evening of Thursday, March 4, 1948, at Rusis in the district of Teyateyaneng, and the purport of the evidence of the witnesses other than the accomplices may be shortly stated as follows: On March 4, there was a funeral a few

(1) [1949] A. C. 253.
(2) Ibid. 264.
(3) Ibid. 267.
(4) Ibid. 265.

miles away from Rusis, and the deceased rode to that funeral in a small party which included No. 11 accused, who was his brother or cousin. On their way back from the funeral, and some distance before Rusis was reached, No. 11 accused suggested that the party should gallop their horses. The deceased was not in very good health and was unable to gallop, so he refused to gallop and was left behind by the rest of the party. There is nothing to suggest that at this time he was intoxicated or in other than his usual health. He was not seen alive again by any of the witnesses other than the accomplices. Shortly after leaving the deceased behind the party passed a group of men standing near the road and No. 11 accused left the party to join these men. He remained with them for a short time and then made up on the party which had ridden on slowly. The following morning the deceased's wife was anxious as her husband had not returned. She consulted No. 11 accused, who lived nearby, but he was not helpful. Some time after that the deceased's horse returned home riderless and without its saddle. His wife then went out to search for him and in the course of her search went to the house of No. 8 accused. She was there informed that a saddle and other articles had been found in the open some distance away. She went out and identified the saddle, saddle cloth, sjambok and handkerchief as articles belonging to her husband. These articles were found lying about one hundred yards from the road. Nothing further was discovered that day. Early the next morning, on Saturday, March 6, a witness, who was a servant of No. 8 accused, found the body of the deceased lying in a donga some four or five hundred yards from the road. The approach to the donga is steep and rough, there being a low ridge intervening. The donga is a steep-sided cleft in this ridge. This servant of No. 8 accused was in the habit of going to this donga in the morning. No. 8 accused had a number of lunatics under his charge and this servant used to take them out in that direction. On this occasion he went out to the donga at a very early hour: on his return he reported that he had found a body in the donga. The police were sent for and the deceased's body was removed.

A post-mortem examination of the body was made during the afternoon of Sunday, March 7. This disclosed that the cause of death was drowning. There had been heavy rain on Thursday and some water had accumulated at the bottom of the donga, but any person falling into that water could easily have got out unless he was seriously injured or unconscious. If the deceased was unconscious when he fell into the donga, the position in which his body was lying was such that he would have drowned in a few inches of water. When the body was removed from the donga some small crabs were found below it, and the post-mortem examination disclosed that crabs had eaten small parts of the flesh at various points, and that considerable parts of the lips had gone : these parts might have been eaten by crabs or they might have been cut off. There were no other significant injuries. The only other material fact disclosed by the post-mortem examination was that the deceased had eaten a large meal within a comparatively short time before his death. There was a large meal provided at the funeral which he had attended and that fact, together with the medical evidence that he had been dead about two and a half days when the post-mortem examination was made, show that he must have died not very long after the time when he was left behind by the rest of the party on his way home from the funeral. Only one boot was found on the deceased's body. Sometime on Sunday, the 7th, another witness found the deceased's hat and the other boot lying in the open about half way between the place where the saddle was found and the donga where the body was found. Some stress was laid by counsel for the appellants on the absence of blood from the blankets which the deceased was wearing, and on the fact that the body was not bruised. As regards the absence of blood, these blankets were not carefully examined, but there was no blood apparent ; on the other hand, the water might have washed away any blood there was. The absence of bruising is remarkable on any view of the facts, because it seems clear that the deceased must have fallen or been thrown from the top of the donga to the bottom, a height of some 13 feet. He must have been unconscious when he reached the bottom or he would not have been drowned, and in such circumstances bruising might have been expected whatever the cause of his fall into the donga ; but the medical evidence was to the effect that the blankets which he was wearing, and the fact that there was mud at the bottom of the donga could account for the absence of bruising. In their Lordships' judgment these facts are not consistent with death by accident, and are sufficient to prove that the deceased must have been

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subjected to violence before his death. It cannot be supposed that the deceased voluntarily dismounted, unsaddled his horse, walked in the direction of the donga and fell in. He might have been thrown from his horse where the saddle was found, but it seems incredible that in that event he would have wandered off in a dazed condition over rough ground, dropped a boot on the way and finally have reached the donga a quarter of a mile away. It was also suggested that he might have had an epileptic fit. There was evidence that at one time he had suffered from epilepsy, but similar considerations make it equally difficult to suppose that an epileptic fit could have caused him to wander off in the way which has been described. The only conclusion which can reasonably be drawn from the facts is that the deceased was carried to the donga and was unconscious when he was put into it and left there.

Their Lordships therefore hold that there is in this case sufficient evidence independent of that of the accomplices to show that a crime was committed and to satisfy the test laid down in *Tumahole's* case (1).

That, however, does not end the case. Although there was independent evidence sufficient to show that a crime had been committed, that evidence only implicated one, or, at most, two of the accused as having taken part in the crime. There was no evidence beyond that of the accomplices to show that any of the other accused had taken part in the crime. It was argued for the appellants in this case that, although s. 231 permits a court to convict on accomplice evidence alone once the proviso is satisfied by independent proof that a crime has been committed, *Tumahole's* case (1) decides that before doing so the court must have in mind and apply the cautionary rule of English practice, emphasizing the danger of acting on accomplice evidence (be it that of one or more accomplices) which is uncorroborated in some material respect implicating the accused. It was argued that the learned judge who tried this case did not have in mind or apply that rule and therefore that the appeal must succeed. To appreciate this argument it is necessary to refer briefly to the evidence of the accomplices and to the way in which the learned judge dealt with it. One of the four accomplices who gave evidence, Moha Moli, was described by counsel for the Crown as an untruthful witness and no reliance was placed on his evidence. The Crown case depended on the evidence of the

(1) [1949] A. C. 253.

other three accomplices, Mapeshoane, Sothi and Sepalami. The evidence of Mapeshoane was that on the evening of March 3, all the accused except Nos. 8 and 9 met at No. 2 accused's house. No. 2 accused is the local chief, and No. 1 accused, a son of the late paramount chief, was staying with No. 2 accused at that time. There was also present another chief, Ntoane, who died before the trial. It was arranged at this meeting that there should be a ritual murder, that No. 11 accused would "sell" his brother, the deceased, for £100 to be the victim, and that he would contrive that his brother would be alone when passing the place appointed for the murder on the following day of his return journey from the funeral. No. 11 accused did so contrive, and when the deceased reached the appointed place all the accused (other than No. 11) the four accomplices and the deceased Ntoane intercepted him, dragged him from his horse and held him down, throttling or strangling him while portions of his upper and lower lips were cut off by Ntoane and handed to No. 1 accused, Chief Bereng. Chief Bereng is said then to have remarked: "This man of yours has no blood, he is an unhealthy person" and no more wounds were inflicted. It was apparently thought that he was already dead and the chiefs directed that he should be taken away by some of the accused and thrown into the donga where his body was found two days later. The other two accomplices were not present at the meeting on March 3. But with regard to the events of March 4, their evidence was similar in most respects to that of Mapeshoane. The evidence of these three witnesses was given at considerable length and with a wealth of detail. The learned judge examined this evidence with great care. He said "it is difficult "to believe that they could have concocted the terrible "story to which they have deposed," and at the end of his examination of the evidence he expressed his conclusions in these terms:—

"Mapeshoane was cross-examined in great detail by counsel "for the defence, and in my opinion his evidence was not "shaken. He gave his evidence well and conveyed the "impression to me that he was speaking the truth. I can "find no sufficient grounds for rejecting his evidence. His "evidence is corroborated as to the meeting of March 3 by "Ntsane and Makhetha Ntai. (These two witnesses accom"panied Mapeshoane to the house of No. 2 accused but did not "attend the meeting.) As to the events of the evening of

" March 4 he was corroborated in material respects by the " evidence of the witnesses Sothi, Sepalami and Moliko. It is " true that Sothi's evidence is, in many respects, at variance with " that of Mapeshoane. He is an unintelligent man of weak " character, but in my opinion he tried to tell the truth to " the best of his recollection and ability. Sepalami's evidence " was substantially in agreement with that of Mapeshoane. " As I have said, they told a circumstantial and terrible story " with a wealth of detail and I cannot believe that it was " concocted."

It was argued that nevertheless the learned judge misdirected himself, first because he accepted the submission of the Attorney-General, who conducted the case for the Crown, that one accomplice can corroborate another accomplice; and secondly, because the cautionary rule which he had in mind fell short of the cautionary rule of English practice. Again it becomes necessary to consider what was decided in *Tumahole's* case (1). In that case, after having decided the case on the ground that there was no independent evidence to prove that the deceased had been murdered and had not died by accident, their Lordships' judgment proceeded:— " That is enough to dispose of the appeal, but their Lordships " think it right to refer to two further matters which it raised " and which are of importance in the administration of criminal " justice in the Territory. The first of these relates to the " cautionary rule of English practice emphasizing the dangers " of acting on accomplice evidence (be it that of one or more " accomplices) which is uncorroborated in some material " respect implicating the accused. It was not suggested " that this rule of practice was alien to the conduct of criminal " proceedings in Basutoland, or that it had been ousted by " the provisions of s. 231" (2).

In the present case their Lordships have had the advantage of hearing an argument by the learned Attorney-General for the Territory in the course of which he drew their Lordships' attention to several matters which had not been put before the Board which decided *Tumahole's* case (1). In *Tumahole's* case (1) it was argued for the appellants, and not disputed by counsel for the Crown, that from 1884 onwards English law and practice had been applicable in Basutoland except in so far as superseded by legislative enactment and that, accordingly, the English cautionary rule must apply as it was

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(1) [1949] A. C. 253.

(2) Ibid. 268.

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not inconsistent with the provisions of s. 231. It now appears that this is a misapprehension. Basutoland was annexed to the Colony of the Cape of Good Hope by an Act of the legislature of that Colony in 1871, and from that time until 1884 it remained a part of that Colony. In 1884 the legislature of that Colony passed a bill to provide for the disannexation of Basutoland from the Colony. That bill was reserved for the signification of Her Majesty's pleasure thereon, and on February 2, 1884, by Order in Council it was provided, inter alia, that Basutoland should again come under the direct authority of Her Majesty and that all laws in force in Basutoland at the time when this Order took effect should continue in operation until repealed or altered by proclamation of the High Commissioner. On May 29, 1884, the High Commissioner made a proclamation, art. 12 of which is as follows :—

> " In all suits, actions, or proceedings, civil or criminal, " the law to be administered shall, as nearly as the " circumstances of the country will permit, be the same " as the law for the time being in force in the Colony of the " Cape of Good Hope :
>
> " Provided, however, that in any suit, action or proceeding " in any court, to which all the parties are natives, and in " all suits, actions, or proceedings whatsoever, before any " Native Chief exercising jurisdiction as aforesaid, native " law may be administered ; and provided, further, that " no Act passed after this by the Parliament of the Colony " of the Cape of Good Hope, shall be deemed to apply to " the said territory."

In 1884 the law in force in the Colony of the Cape of Good Hope with regard to accomplice evidence was in substantially the same terms as those of s. 231 as now amended, and that law continued to be in force in Basutoland until 1938. In 1938 the law of Basutoland was changed. Section 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, in its original form was as follows :

> " Any court which is trying any person on a charge of " any offence may convict him of any offence alleged against " him in the indictment or summons on the single evidence " of any accomplice :
>
> " Provided that the testimony of the accomplice is " corroborated by independent evidence which affects the " accused by connecting or tending to connect him with

"the crime: Provided further that such evidence shall "consist of evidence other than that of another accomplice "or other accomplices."

These provisoes were new and were obviously based on English practice. But after a period of six years they were repealed by the Proclamation of 1944, already referred to, with the result that the law of Basutoland on this matter reverted to what it had been before 1938.

The learned Attorney-General for the Territory cited to their Lordships a series of decisions of the Appellate Division of the Supreme Court of South Africa which show that since 1918 the courts of the Union of South Africa have consistently adopted a construction of the corresponding section in the Criminal and Procedure Evidence Act, 1917, of the Union of South Africa, which is different from that adopted by the Board in *Tumahole's* case (1), and he also brought to their Lordships' attention the existence in South Africa of a cautionary rule which, while different in some respects from the cautionary rule of English practice, is based on the same broad considerations of fairness to the accused. It is extremely regrettable that these matters were not brought to the attention of the Board in *Tumahole's* case (1).

The learned Attorney-General argued that *Tumahole's* case (1) was wrongly decided. It is not necessary for their Lordships to consider that argument in so far as it relates to the construction of s. 231. Their Lordships have already stated their reasons for holding that, in so far as it is based on that ground, the present appeal must fail whether the construction put on that section in *Tumahole's* case (1) was correct or not. Their Lordships therefore do not propose to express any opinion in this case as to the propriety of reopening this question or as to the validity of the argument submitted. But their Lordships think it necessary to examine further the question whether the cautionary rule of English practice must be applied in Basutoland.

It is not disputed, and there is no doubt, that a judge in Basutoland, as elsewhere, must always have in mind the danger of accepting accomplice evidence which is uncorroborated by independent evidence: the question is whether a judge in Basutoland must apply the rule of English practice as laid down by the Court of Criminal Appeal in *Rex* v. *Baskerville* (2). In the present case the learned judge who convicted the

(1) [1949] A. C. 253.

(2) [1916] 2 K. B. 658.

appellants was referred to the cautionary rule which is followed in South Africa and he appears to have been guided by it. That rule has been stated by Schreiner J.A. in *Rex* v. *Ncanana* (1) in the following terms: "The cautious court "or jury will often properly acquit in the absence of other "evidence connecting the accused with the crime, but no "rule of law or practice requires it to do so. What *is* required "is that the trier of fact should warn himself, or, if the trier "is a jury, that it should be warned, of the special danger "of convicting on the evidence of an accomplice; for an "accomplice is not merely a witness with a possible motive "to tell lies about an innocent accused but is such a witness "peculiarly equipped, by reason of his inside knowledge "of the crime, to convince the unwary that his lies are the "truth. This special danger is not met by corroboration "of the accomplice in material respects not implicating the "accused, or by proof aliunde that the crime charged was "committed by someone; so that satisfaction of the require-"ments of s. 285 [the section in the South African Act "corresponding to s. 231 in Basutoland] does not sufficiently "protect the accused against the risk of false incrimination "by an accomplice. The risk that he may be convicted "wrongly although s. 285 has been satisfied will be reduced, "and in the most satisfactory way, if there is corroboration "implicating the accused. But it will also be reduced if "the accused shows himself to be a lying witness or if he "does not give evidence to contradict or explain that of the "accomplice. And it will also be reduced, even in the absence "of these features, if the trier of fact understands the peculiar "danger inherent in accomplice evidence and appreciates "that acceptance of the accomplice and rejection of the "accused is, in such circumstances, only permissible where "the merits of the former as a witness and the demerits of "the latter are beyond question."

In *Tumahole's* case (2) in view of the arguments submitted, it was almost inevitable that reference should be made to the English cautionary rule. It was admitted, and rightly admitted, that a cautionary rule must be observed in Basutoland, and no rule other than the English rule was suggested as applicable. In the circumstances their Lordships do not regard *Tumahole's* case (2) as a decision that the law of Basutoland requires the application of the English rule and

(1) (1948) 4 S. A. L. R. 399, 405. (2) [1949] A. C. 253.

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no other. Reference was made to s. 268 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, which is in the following terms: "In criminal proceedings in any "case not provided for in this chapter the law as to admissibility of evidence and as to the competency, examination "and cross-examination of witnesses in force in criminal "proceedings in the Supreme Court of Judicature in England "shall be followed in like cases by the Courts of the Territory "and by District Commissioners holding preparatory "examinations." The cautionary rule is concerned neither with the admissibility of evidence nor with the competency, examination or cross-examination of witnesses, and this section cannot therefore be authority for requiring the adoption of the English cautionary rule. No other legislative provision in force in Basutoland was suggested as containing such authority. Their Lordships are now satisfied that the South African cautionary rule is properly applicable in Basutoland, and that it was present to the mind of the learned judge who convicted the appellants and properly applied by him in this case. The appeal must therefore fail on this ground also.

One other matter must be noticed. It appears that shortly before his death the deceased chief Ntoane made a statement about the facts of this case, and that rumours about this statement had been heard in the course of his administrative duties by one of the administrative officers who sat to assist the judge in this case. In *Tumahole's* case (1), their Lordships commented on the conduct of an officer who had, before the trial and in the absence of the accused, taken active steps to acquaint himself with the facts of the case and had interrogated one of the witnesses. In their Lordships' view that is an entirely different matter: it is impossible to hold that an officer who has taken no active steps to acquire information, but who happens to have heard some rumour about a case, is disqualified from sitting or acts improperly in sitting at the trial. It is not suggested that this officer passed on the rumours to the judge or made any other use of them.

Their Lordships have already intimated that they would humbly advise His Majesty that this appeal should be dismissed.

Solicitors for appellants: *Barrow, Rogers and Nevill.*
Solicitors for respondent: *Burchells.*

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[HOUSE OF LORDS]

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1949

June 21, 22 ;
Oct. 20.

KAHLER . . . . APPELLANT ;

AND

MIDLAND BANK LD. . . . . RESPONDENT.

Banking—Private international law—Contract—Deposit of securities—Foreign bank holding Canadian securities in safe custody for customer—Deposit by foreign bank with English bank—Customer's demand for delivery from English bank—No consent by foreign bank—Foreign legislation regulating release or transfer of securities—Effect.

The appellant, then a Czechoslovakian national resident in Czechoslovakia, purchased in London shares in a Canadian company, which were for practical purposes bearer securities. In December, 1938, his bankers, the Z. Bank, a Czechoslovakian firm, informed him that they were crediting him with these shares in his deposit account, noting that these were in safe deposit and domiciled in London. In January, 1939, they wrote to the respondent bank in London, a British bank, informing them that they would receive these shares " for our account " and requesting them to " place them into our depot with your goodselves, " crediting us for same under advice to us." The respondent bank in acknowledging this letter on a printed form referred to the Z. Bank as the customer. In March, 1939, the German forces occupied Czechoslovakia and the appellant, who was anxious to leave, was permitted to do so only on condition that he deposited with the B. Bank (a Czechoslovakian firm then under the control of the German authorities) all his securities, including the shares in question, authorizing that bank to dispose of them in his name, and under duress he signed an agreement to this effect. From April 2, 1939, he permanently ceased to reside in Czechoslovakia and he ultimately became a naturalized citizen of the United States of America. On April 17, 1939, the Z. Bank wrote to the respondent bank requesting them to " withdraw from our securities " account with your goodselves " the shares in question and " to " place same into the depot of the [B. Bank] with your goodselves. " This transfer is made by order and for the account of the owner " of these shares [the appellant] . . . . who transfers his securities " account from our bank to the [B. Bank]. The ownership of " the above shares remains unchanged." This was acknowledged by the respondent bank on a printed form, the appellant being named as owner and his address in Czechoslovakia added. The appellant's ownership of the shares was not disputed and no one else claimed any beneficial interest in them. He brought an action

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**Present :* LORD SIMONDS, LORD NORMAND, LORD MACDERMOTT, LORD REID and LORD RADCLIFFE.

against the respondent bank claiming delivery to him of the share certificates and accepting by his pleading that they had been properly transferred to the depot of the B. Bank with the respondent bank. The respondent bank contended that they could not deliver them to the appellant since they held them to the order and for the account of the B. Bank and under the currency control legislation of Czechoslovakia it was illegal for the B. Bank to part with the securities to a "currency foreigner," such as the appellant, without the consent of the Czechoslovak National Bank, which had been refused. The action having remained dormant during the war, it was admitted, after its termination, that the consent neither of His Majesty's Treasury nor of the Board of Trade was then required for the delivery up of the share certificates.

Held, that there was no contractual nexus between the appellant and the respondent bank.

Held, further, on the appellant's claim in detinue (*per* Lord Simonds, Lord Normand and Lord Radcliffe, Lord MacDermott and Lord Reid dissenting) that the proper law of the contract between the appellant and the B. Bank was Czechoslovakian law and accordingly the appellant could not show that he was entitled to possession of the share certificates.

The English courts will not compel performance of a contract when by its proper law performance is illegal and, since under the law of Czechoslovakia the B. Bank could not lawfully part with the share certificates, delivery up by the respondent bank, the bailee, could not be ordered.

Decision of the Court of Appeal affirmed.

APPEAL from the Court of Appeal (Scott, Asquith and Evershed L.JJ.).

This was an appeal from a judgment of the Court of Appeal given on April 19, 1948, whereby the court set aside the judgment entered for the appellant in an action tried before Macnaghten J. sitting without a jury on June 4, 1947, wherein the appellant was plaintiff and the respondents were defendants. The court held, in substance, that the respondents were entitled to withhold certain share certificates, which admittedly were the property of the appellant and in which the respondents claimed no right, title or interest whatsoever. The facts are fully stated in the opinions of their Lordships.

Salmon K.C. and *Douglas Potter* for the appellant.

Sir Valentine Holmes K.C., *H. L. Parker* and *John Foster* for the respondent bank.

The arguments sufficiently appear from the opinions of their Lordships.

Their Lordships took time for consideration.

Oct. 20. LORD SIMONDS. My Lords, the facts of this case are fully stated in the opinion which my noble and learned friend Lord Normand will deliver and I need not rehearse them. Nor, but for the fact that, as I understand, some of your Lordships do not concur in the view that this appeal should be dismissed, should I have thought it necessary to add any words of my own.

It appears to me, my Lords, that the solution of this case depends on the view which is taken of the relation in which the appellant stood, or must be deemed to have stood, to the Bohemian Bank after that bank had succeeded the Zivnostenska Bank as the customer of, and bailor to, the Midland Bank in respect of the securities which are the subject of this appeal. I advisedly say "stood or must deemed to have "stood," for whatever alternative contention might have been open to the appellant, he has by his pleading, original, amended and re-amended, committed himself—and I do not doubt, for very good reason committed himself—to the view that the securities were properly transferred from the depot of the Zivnostenska Bank to that of the Bohemian Bank with the Midland Bank. This view of the transaction materially narrows the area of debate.

In the first place I am clearly of opinion that the Court of Appeal was right in holding that between the appellant and the Midland Bank there was no contractual nexus. Upon this point there is no disagreement among your Lordships.

But it is upon the alternative plea that a difference arises. The appellant, contract failing him, claims in detinue. The securities, he says, are his. Neither the Midland Bank nor the Bohemian Bank claims any beneficial interest in, or lien over, them. The answer made by the Bank is that that is not enough to support a claim in detinue; the appellant must show also that he is entitled to immediate possession, and that he cannot do, for the Midland Bank holds the securities in safe custody for the Bohemian Bank and that bank is entitled to refuse delivery to the appellant. It is the validity of this answer which is in issue and it is, I think, a matter of regret that the appellant did not think fit to bring before the court the Bohemian Bank whose answer it is. The question, however, is the same whether the answer is made by the one bank or the other.

It becomes necessary then to examine the answer made by the Midland Bank. It involves two propositions which

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are to some extent interdependent. The first is that under Czechoslovak law the Bohemian Bank cannot lawfully deliver the securities to the appellant; the second, that, therefore, their bailee, the Midland Bank, ought not to be compelled by the courts of this country so to deliver them up.

The first of these propositions is clearly established by the evidence of Dr. Hartmann, which does not appear to me to be open to challenge. It is necessary only to say that the relevant law relating to foreign exchange, under which the delivery without a consent that was in fact withheld would be illegal, is not in my opinion a law of such a penal or confiscatory nature that it should be disregarded by the courts of this country.

The second proposition presents greater difficulties. It involves the consideration of two matters; first, what were the terms of the contract of bailment between the appellant and the Bohemian Bank, and second, what was the law governing its performance so far as that consisted of delivery of the securities upon termination of the bailment. First, as to the terms of the contract. Here, my Lords, we are, I think, in a region of artificiality. For though, as I have already said, the appellant is committed to the view that the securities were properly transferred to the depot of the Bohemian Bank with the Midland Bank, yet it remains to determine what as between him and the Bohemian Bank were the contractual terms. Herein lies the difficulty. But it appears to me that, admitting the proper transfer of the securities to the depot of the Bohemian Bank and alleging no other terms as between himself and that bank than had formerly obtained between himself and the Zivnostenska Bank, the appellant is driven to the admission that he is in the same position, no better and no worse, as he would be in, if no transfer had taken place. What then would the position be if, on behalf not of the Bohemian Bank but of the Zivnostenska Bank, the Midland Bank had pleaded that the appellant was not entitled to immediate possession because their bailors were entitled to refuse delivery? This would depend, I think, on one thing only, viz., what is the proper law of the contract between the parties. If the proper law is the law of Czechoslovakia, I have no doubt that the defence is a valid one; for the courts of this country will not compel the performance of a contract if by its proper law performance is illegal. And it follows that it must be admitted as a good defence in an action of detinue that the bailor, whose bailee is sued, is entitled to deny possession to the plaintiff because it is illegal to give him possession.

What then is the proper law of the contract that was made with the Zivnostenska Bank and that I have assumed to have been renewed with the Bohemian Bank ? In my opinion, it was the law of Czechoslovakia. The contract was made in that country between an individual and a corporation both resident there. At the date of the contract and at the material times thereafter the law of Czechoslovakia included a law regulating transactions in foreign exchange substantially the same as that which prevailed at the date of the issue of the writ. At all material times it was illegal for the bank, Zivnostenska or Bohemian, to part with foreign securities in its custody without the consent of the National Bank or other proper authority, whether those securities were at the date of the contract in fact situate in Czechoslovakia or in some other country. In these circumstances I cannot accede to the contention of the appellant that the proper law of the contract so far as it concerns the delivery of the securities is governed by the law of England or of any other country in which they may chance to be situate. I do not doubt that the appellant may have hoped to obtain some advantage by having his securities kept in London. But, whatever his hopes or fears, it is impossible to suppose either that the bank intended any other law than that of Czechoslovakia to govern the contract or that the appellant could impute any such intention to them. Why should they be presumed to subject themselves to a foreign law, whose application might make them liable to penalties under their own law ? And why should he be presumed to have made a contract in the faith that its performance would be governed by a foreign law, when he must have known that the bank would by no means agree to submit to it ? On the other hand it is easy to presume that a contract, clearly governed by the lex loci contractus in its interpretation and in all aspects of the rights and obligations it creates except that of delivery up, should in that aspect also be governed by the same law. I doubt whether your Lordships can get any assistance from the very numerous authorities on this branch of the law and I refrain from reviewing them. Ultimately the test is that stated by Dicey in r. 136 (p. 579 of the 6th edition of the Conflict of Laws) : the " ' proper law of a contract ' means the law "or laws by which the parties intended, or may fairly be "presumed to have intended, the contract to be governed." I think that the fair presumption to be derived from the whole of the circumstances of the contract, unusual and artificial as they are, is that the parties intended the law of Czechoslovakia to govern it in all its aspects.

Coming to this conclusion, I must hold that the Bohemian Bank would be entitled to deny possession of the securities to the appellant so long as under Czechoslovakian law it was lawfully forbidden to hand them over. If so, its bailee, the Midland Bank, should not be compelled in the absence of the Bohemian Bank to deliver them up.

For these reasons, which will be amplified by some of your Lordships, I am of opinion that this appeal should be dismissed with costs.

LORD NORMAND. My Lords, this appeal involves questions of difficulty affecting the owner's right to delivery of securities, deposited in a London bank by a bank in a foreign country the law of which under certain conditions restricts the disposal or transfer of possession of the securities.

The action was begun in July, 1939, but proceedings were suspended during the war. In June, 1947, Macnaghten J. gave judgment in favour of the appellant and ordered the respondents to deliver to him the share certificates, which are the subject of this claim. This judgment was reversed by the Court of Appeal in April, 1948. The action was pleaded both on contract and in detinue. The judgment of Macnaghten J. was a judgment in detinue, and I may say at once that I agree both with the Court of Appeal and with my noble and learned friend on the woolsack and my noble and learned friends who are yet to address the House and whose opinions I have had the advantage of reading in print, that the appellant has failed to establish that there was privity of contract between himself and the respondents.

The appellant was a native of Czechoslovakia who formerly resided in Prague. In March, 1927, or later, he bought on the London Stock Exchange through his bankers in Zurich shares of the Brazilian Traction Light and Power Co., Ld. The share certificates, which are for practical purposes bearer securities, remained in London. The Zurich bankers transferred the shares from the credit of the appellant's account with them to the credit of Messrs. Petschek & Co., bankers in Prague.

From time to time the appellant caused certain of his shares to be sold, and in January, 1937, the number owned by him was 800, which were then, as they still are, deposited with the respondents in London. On December 28, 1938, the Zivnostenska Bank, Prague, which was taking over the business of Messrs Petschek & Co., wrote a letter to the appellant informing him that they were by order of Messrs. Petschek crediting him with certain listed securities in the deposit account which they had recently opened for him. The list of securities included the 800 Brazilian Traction Co. shares with which this appeal is concerned and they were noted in the list as " domiciled " in London. On January 16, 1939, the Zivnostenska bank wrote also to the respondents in London informing them that they would receive for Zivnostenska's account from Messrs. Samuel Montagu & Co., London, by order of Messrs. Petschek, 1,164 Brazilian Traction shares (which, it is agreed, included the 800 owned by the appellant) and requesting the respondents to place them in the Zivnostenska's deposit with the respondents. In reply to this letter the respondents on February 6, 1939, sent to Zivnostenska a printed form bearing that the Zivnostenska Bank was the " customer," and that specified shares including the 1,164 Brazilian Traction shares had been received from Samuel Montagu & Co., by order of Messrs. Petschek & Co. There was a blank space in which the name of the owner of the shares would have been inserted if known. These documents, it is common ground, evidence two contracts, first, a contract between the appellant and the Zivnostenska Bank, which now becomes his banker and his bailee for the securities, and second, a contract between the Zivnostenska Bank and the respondents by which the respondents become the Zivnostenska Bank's bailee.

In March, 1939, the Germans overran Czechoslovakia, and the appellant, who is of Jewish race, became a victim of their persecutions. I may pass over the details of the proceedings by which the appellant was forced to deposit with the Bohemian Discount and Credit Bank all securities which he possessed including the shares in suit and to authorize that bank to dispose of them in his name. The appellant signed a written " agreement " confirming this arrangement but as it was signed under duress it is not binding on him, In return for his signature the appellant on April 2, 1939, was allowed to leave Czechoslovakia ; he first resided in

France and afterwards in the United States of America, of which he is now a naturalized citizen.

The next document is important. It is a letter from the Zivnostenska Bank to the respondents dated April 17, 1939, and I quote its terms in full:

"Dear Sirs,

"By the present we beg to request you to withdraw from "our securities account with your goodselves 800 *shares* "*Brazilian Traction Light and Power Comp. Ord. Cap. Stock.* "*No Par,* using for this purpose the shares which were credited "to our above account on February 6, 1939/ref. B64318/— "and to place same into the depot of the Bohemian Discount "Bank and Society of Credit, Praha, with your goodselves. "This transfer is made by order and for account of the owner "of these shares, Mr. Viktor Kahler, Praha II, Vaclav. nam. 55, "who transfers his securities account from our bank to the "Bohemian Discount Bank and Society of Credit, Praha. "The ownership of the above shares remains unchanged.

"While crediting you for these shares on the securities "account, we remain, dear sirs,

"Yours very truly,

"ZIVNOSTENSKA BANKA."

As a result of the receipt of that letter the respondents on May 11, 1939, sent to the Bohemian Bank a printed form similar to that sent to the Zivnostenska Bank on February 6. Some differences may be noted; the appellant is named as owner and his address in Prague is entered, and the document "advises the receipt for your account" of the 800 Brazilian Traction shares. No communication was sent by the respondents to the appellant at the time. There is no doubt that Zivnostenska's letter of April 17 was part of the machinery by which the German Government in Czechoslovakia and its agents carried into effect the agreement which they had forced the appellant to sign. Further steps were taken as the result of which the Bohemian Bank came to hold the securities, not for the appellant, but for the German authorities.

The appellant now entered into correspondence with the respondents, seeking without success to obtain from them an undertaking not to part with the securities except with his consent. The respondents' attitude then was that they had received the securities from the Zivnostenska Bank without intimation that they were to be held to the appellant's order. On July 26 the appellant wrote a letter to the Zivnostenska

Bank purporting to determine its authority to hold his securities and a copy of this letter was sent by him to the respondents.

To complete the statement of the relevant facts as they stood at the raising of this action I must now deal with the Czechoslovakian exchange regulations which the respondents allege and the Court of Appeal has found to be an impediment to the delivery of the securities in suit. Among the proved documents is a translation of the material paragraphs of the Czechoslovakian Foreign Exchange Act, No. 92 of 1946, and it is proved that regulations having the same effect have been in force in Czechoslovakia since 1934. The regulations made it unlawful and a punishable offence to transfer, without the permission of the Czechoslovakian National Bank, foreign securities " from a currency inlander to a currency foreigner " into his ownership, as a pledge or for any other reason and " by whatever way (book transfer, placing into safe custody, " transfer of securities in safe custody into another name, " release, etc.)," or " from a currency foreigner to a currency " inlander into his ownership, as a pledge or for any other " reason " ; or " from a currency inlander to a currency " inlander into his ownership, as a pledge or for any other " reason." Dr. Hartmann, a Czechoslovakian lawyer of experience, gave evidence about the meaning and effect of these regulations. His evidence is that " currency inlanders " are persons who have their normal residence in Czechoslovakia and have lived there for at least one year, and that all other persons are currency foreigners. The appellant was therefore a currency inlander till April 2, 1939, and he was thereafter a currency foreigner. Dr. Hartmann deponed also that, at the time when the securities were placed in the depot of the Zivnostenska Bank of the respondent bank, the Zivnostenska Bank could not have delivered them to the appellant without the consent of the National Bank, because the Zivnostenska Bank and the appellant were at that time both currency inlanders, and that after the appellant left Czechoslovakia and became a currency foreigner they could still not be delivered to him by a bank in Czechoslovakia without the consent ot the National Bank. Under cross-examination he said that the word " transfer " in the regulations was not a matter of title but included a transfer of possession. There was no counter evidence, and Dr. Hartmann's evidence must be accepted as conclusive evidence of the law applicable in Czechoslovakia to the transfer of possession of foreign securities.

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In answer to the appellant's claim for a declaration that he was the owner of and beneficially entitled to the share certificates and for an order for their delivery, the respondents pleaded inter alia that since May 11, 1939, they had held the share certificates to the order and for the account of the Bohemian Bank and that it was their duty not to part with them without the assent of their customer unless on proof of the appellant's title to immediate possession. They also pleaded that they were prohibited by the provisions of the Czechoslovakia (Restriction on Banking Accounts) Act, 1939, from parting with them without Treasury consent, or alternatively that the certificates were enemy property and that under the Trading with the Enemy (Custodian) Order, 1939, they were prohibited from dealing with them without the consent of the Board of Trade. Any difficulties created by these enactments have, however, been removed because the consents of the Treasury and the Board of Trade were obtained on March 27, 1947. After the war ended and before the trial of the action the appellant's solicitors were in communication with the Bohemian Bank in Czechoslovakia. The result was, in brief, that the Bohemian Bank admitted that it did not maintain any claim to the securities, but informed the appellant's solicitors that the National Bank's position was that any transactions with the securities needed its consent. The solicitors tried to obtain the consent of the National Bank to the delivery of the securities but it was refused.

My Lords, the appellant's contention as stated in his case is that "he had an immediate right to the possession of "the shares and that the Bohemian Bank's consent to the "delivery up of the shares was unnecessary and that their "failure to consent should be ignored." It was on this contention that the decision of the Court of Appeal hinged. Evershed L.J. said (1): "In my judgment, to succeed . . . . "the plaintiff must prove not merely that he is absolutely "entitled beneficially to the shares, but also that he is entitled "to possession of the certificates." With that way of stating the issue there can, I think, be no quarrel. The true owner's right to delivery of goods deposited by a third party with a bailee, depends on his right to immediate possession (*Gordon* v. *Harper* (2), *Bradley* v. *Copley* (3)), and if there is any defect in his right to immediate possession he must fail. Usually

(1) [1948] 1 All E. R. 811, 818.

(2) (1796) 7 Term. Rep. 9.

(3) (1845) 1 C. B. 685.

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the defect arises from an adverse right of possession in a third party. But a defect arising from another cause would, I think, be equally fatal. In the present case, therefore, it is not sufficient that the appellant has established his title to the ownership of the shares; the bailee is entitled to demand proof that he is entitled to immediate possession. In the circumstances of this case that depends on the question whether there was a contract between the appellant and the bailor, the Bohemian Bank, and, if so, upon the meaning and effect of that contract.

It is unfortunate that the appellant did not convene as defendants, in addition to the respondents, the Zivnostenska and the Bohemian Banks. If he had done so and if they, or at any rate the Bohemian Bank, had appeared the issues would have been contested between the proper contradictors. The appellant did not choose to take that course. So it has come about that the respondents have been allowed to state contentions and maintain arguments which properly lay not in their mouth but in the mouth of the Bohemian Bank. Of this irregularity the appellant cannot complain and he must accept the situation which he has created by his own procedure and pleadings. It was perhaps the respondents' submission, that there was no contract between them and the appellant and that their customer was the Bohemian Bank and it alone, that induced the appellant to amend his pleadings in the Court of Appeal. By that amendment he has finally set at rest any doubt whether there was a contract between him and the Bohemian Bank, for he there alleges that the Zivnostenska Bank had been his bankers, and that purporting to act as his bankers and in pursuance of an authority to be implied from the relationship of banker and customer the Zivnostenska Bank by the letter of April 17, 1939, instructed the respondents on his behalf to withdraw his certificates from the Zivnostenska Bank's securities account and to place them into the depot of the Bohemian Bank with the respondents for safe custody by order and for account of the appellant. And to clinch the matter he further alleges that if the Zivnostenska Bank had no authority to write the letter of April 17, 1939, he subsequently ratified its act in writing it. This amendment precludes the appellant from contending that the letter of April 17, 1939, falls to be disregarded as being part of the machinery by which the German authorities effected the confiscation of the appellant's property, and it becomes unnecessary to consider that contention and the consequences which might flow from it if it were sustained.

Whether under the contract so alleged the appellant had against the Bohemian Bank an immediate right of possession, or whether his right of possession was governed by the Czech currency restriction laws must, I think, depend on whether English law or Czechoslovakian law is the proper law of the contract. For, if the proper law of a contract is the law of a foreign country, the courts of this country are by our law bound to apply that foreign law in determining the effect of the obligations undertaken by the parties. In ascertaining what is the proper law of a contract our courts have to solve a question of the parties' intention, and it is here that some difficulty arises. The Bohemian Bank and the appellant have to be taken as contracting parties because the appellant has by his pleadings accepted that position. But he was not a willing party at the time when the letter of April 17, 1939, was written, and it may be doubted whether the Bohemian Bank was a willing party. To ask what law the parties intended to govern the contract, is to ask a question that admits only of an artificial answer. The one clear effect of the letter of April 17, 1939, is to substitute the Bohemian Bank for the Zivnostenska Bank as the appellant's bailee. No change in the incidents or the conditions of the bailment, except that, can be inferred from the letter, and the appellant has suggested none in the amendment of his claim. The appellant, it is true, was no longer resident in Czechoslovakia on April 17, 1939, but it appears to me unreal to inquire whether his change of residence should be taken as affecting the proper law of the bailment. The reality was that he had been allowed to change his residence only on condition of surrendering all right to the shares and neither that surrender nor the consequent change of residence were voluntary acts, for both were the result of German abuse of power and intimidation. They can lead to no inference of intention. I therefore come to the conclusion that the proper law of the bailment between the appellant and the Bohemian Bank must be taken to be the same law as the law which governed the bailment between the appellant and the Zivnostenska Bank. But that was a contract between parties who were resident in Czechoslovakia and subject to its laws. The proper law of that contract was clearly the law of Czechoslovakia. The answer of the Zivnostenska Bank to a demand by the appellant is entitled to possession and, further, that the defendant has failed to comply with a request for delivery. What is open by way of defence to a defendant is not so well settled in cases like the present where the relationship between the parties is not that of bailor and bailee. Can such a defendant, though claiming no adverse right or interest in himself, plead that some third party has such a right or interest and that, by reason thereof, the plaintiff is not entitled to immediate possession ? There seems to be no clear authority on the point but, on principle, I do not see why a defence of this nature should be denied, at any rate where the relationship between the third party and the defendant is that of bailor and bailee. It is true that, as between a claiming bailor and his bailee, the latter is generally precluded from raising a jus tertii. But that rule rests upon an estoppel arising from that relationship and cannot well be invoked where the bailee is sued by a stranger. The settled exception to the rule which permits a bailee to resist his bailor's claim by showing that he has lost the chattel bailed to the true owner or, as it is sometimes put, that he has suffered eviction by title paramount, is more relevant. The broad and simple ground for this exception may, I think, be found in the passage in the judgment of Blackburn J. in *Biddle* v. *Bond* (1), which reads : " The " bailee has no better title than the bailor, and, consequently, " if a person entitled as against the bailor to the property " claims it, the bailee has no defence against him." Speaking generally, two results may be said to flow from this. First, a bailee must be at liberty to resist a claim made by one who is not his bailor by showing that his bailor has the better right to immediate possession. And secondly, a bailee, in order to resist successfully the claim of an owner who is not his bailor, must usually do more than show that he is but a bailee and has not been authorized by his bailor to make delivery in satisfaction of the claim. I do not think this last proposition was seriously challenged at your Lordships' bar, but it is not without relevance, as the respondents' first line of defence, as appears from their letters and the pleadings, was that they could do nothing to meet the appellant's demand without the instructions of their customer, the Bohemian Bank. In the circumstances that was an understandable attitude but, in itself, I do not think it constituted an answer in law to the claim, at any rate after a reasonable time for investigation had elapsed.

(1) (1865) 6 B. & S. 225, 231.

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Proceeding, then, on the basis that it was open to the respondents to show that the Bohemian Bank was entitled as against the appellant to possession, the next question is whether this has been done. As already indicated, the respondents alleged no proprietary interest in the Bohemian Bank or any claim to retention on foot of some charge or lien. They did prove, however, if the assumption I have made above as to the effect of the relevant Czechoslovakian law is justified, that the Bohemian Bank could not do anything to authorize them to hand the certificates over without breaking that law and, indeed, committing a criminal offence thereunder. Now if that were all and the respondents could say no more, I think it is clear that they would have no answer to the present claim. The law of another State will not of itself justify the detention or conversion of property in England which is wrongful according to the law of England. If a foreigner in this jurisdiction finds my watch the courts of this country will not allow him to keep it merely because the law of his own country forbids him, wherever he may be, to make restitution of articles of that sort. The respondents, however, based their case on the conjoint effect of the Czechoslovakian law and the appellant's contract of bailment with the Bohemian Bank. It may be said at once that, if this contract bound that Bank to re-deliver the certificates in Czechoslovakia and not elsewhere, the appellant could not succeed; apart altogether from difficulties of a more technical nature, he would then have to face the rule " that the law of this country will not compel " the fulfilment of an obligation whose performance involves " the doing in a foreign country of something which the " supervenient law of that country has rendered it illegal to " do:" see per Viscount Sankey L.C. in *De Beéche* v. *South American* (*Gath and Chaves*) *Stores Ld.* (1). But this does not, in my opinion, help the respondents in the present case. Whatever else may be said of it, I am satisfied that the contract he made, or must be taken to have made, with the Bohemian Bank entitled the appellant to call for delivery of his certificates in London. That was where the relevant shares had been bought and where the certificates were at all material times. The contract itself referred to the certificates as located in London, though containing no express stipulation as to the place where delivery from safe custody was to be made. On the evidence I can see nothing to preclude the appellant

(1) [1935] A. C. 148, 156.

from requiring the Bohemian Bank to hand over his certificates in London if, in the circumstances, he was entitled to get them at all.

This brings me to the substance of the respondents' defence and the heart of the case as I see it. What the respondents say, if I have gathered their submissions aright, comes in effect to this: the appellant's contract of bailment should be regarded by the courts of this country as governed throughout by Czechoslovakian law, and, so regarded, the effect is that it cannot be determined save with the consent of the National Bank, and as that has not been given, the appellant has no present right to possession in London or elsewhere and cannot therefore sustain a claim in detinue. It may be added here that the relevant Czechoslovakian law has been substantially the same at all times material to this appeal.

My Lords, the appellant's contract must, I think, be rested on the letter of December 28, 1938, which was addressed to him in Prague by the Zivnostenska Bank. This letter says little more than that the securities listed in it are credited to the appellant's deposit account with that bank for safe custody. The list includes some securities which, it may be inferred, were held in Czechoslovakia, but others, including the certificates in question, are shown as "domiciled" elsewhere, some in London, some in New York, one in Amsterdam and another in Tel Aviv. The appellant was then a resident Czechoslovakian and the bank was a Czechoslovakian bank. In these circumstances I am unable to resist the conclusion that, at any rate so far as the interpretation of the contract and the substance of the obligations arising thereunder during the course of the bailment are concerned, the parties may be regarded as intending that the governing law should be that of Czechoslovakia. But must they be taken to have agreed that that law was also to govern the entire performance of the contract abroad, so that if the appellant, as he was entitled to do, sought delivery of his securities where they actually were, say in London or in New York, his bailee would be within its rights in retaining possession until the National Bank gave its consent? If consensus went that length I think it would be an end of the matter, for in such case (and assuming no question of public policy to be involved) the law of England would regard Czechoslovakian law as the proper law of every material aspect and hold, accordingly, that the appellant was not entitled to immediate possession as against the respondents' bailor.

But, my Lords, when the letter of December 28, 1938, and its attendant circumstances are considered, the appellant cannot, in my view, be said to have agreed that the Czechoslovakian foreign exchange laws were to regulate performance outside Czechoslovakia with respect to those of his securities which were listed as domiciled abroad. By the end of 1938 the mounting tide of Nazi aggression was obviously threatening to engulf his country, and no one resident therein who was a man of property and belonged to the Jewish faith could entertain anything but the liveliest fears for himself and his fortune. The wise were those who had at least a part of their substance dispersed abroad and beyond immediate reach, the foolish those who had all in one basket at home. That such was the situation confronting the appellant and his co-religionists at that time cannot I think be disputed as a matter of historical fact. Nor in my opinion can it be ignored in any inquiry as to the contractual intention to be imputed to the appellant concerning the safe custody of his securities in December, 1938. He must be assumed to have known the general nature of the restrictions imposed by Czechoslovakian law, and I think it would not be going too far to say that he must also have appreciated that those restrictions might well be turned to account by the Nazis for their own purposes when they arrived. Why should be intend that his right to deal with his securities abroad should be regulated by those restrictions ? I can see no ground for attributing any such intention to him. On the contrary, it is I think but reasonable to assume that his confidence and hope in regard to these securities must have rested on the laws of the countries where they were placed and where as yet there was freedom and peace.

What, then, of the Zivnostenska Bank ? Can it be taken to have acquiesced in the choice of law which the appellant had such cogent grounds for making part of the contract ? Its position was, of course, quite different and it is impossible to impute to it any intention which would have meant a breach of the laws of its own country. But I do not think it can be said that by agreeing to facilitate the appellant to this extent the bank would necessarily have involved itself in such a breach. The certificates were at all material times in London and in other hands—first those of Samuel Montagu & Co., and then those of the respondents—and an order made against the actual holders by the courts of this jurisdiction on the basis that the law governing performance in England was English would not, so far as I can see, have required of the bank any act or course of conduct forbidden by the law of Czechoslovakia. For this reason, if one were at liberty to infer that the parties had actually come to agreement on the point, I would find it easier to regard them as agreeing to accept English rather than Czechoslovakian law as the law of performance in London. I doubt, however, if the facts justify an inference of agreement. It is true that the letter of December 28, 1938, speaks of the certificates as domiciled in London ; but there is nothing in the evidence to show that this was a term of art apt to attract the law of the place of deposit. I do not think it can be read as more than a statement of location and I can find nothing else in the material available to warrant a firm conclusion that there was agreement in fact on this particular aspect of the matter.

These considerations may not, therefore, suffice to import any stipulation as to the applicability of laws other than those of Czechoslovakia ; but they do suffice, in my opinion, to negative quite definitely the implication of any common intention that the laws of that country should dominate the whole field of performance.

My Lords, if this is the right view to take I do not think it can be displaced or overriden by saying that the contract is a Czechoslovakian contract and that the Czechoslovakian foreign exchange laws—in so far as material—must be read into it. Sir Valentine Holmes, for the respondents, refrained from advancing this contention and I think he was right. There is nothing in the evidence of Dr. Paul Hartmann, the expert witness on Czechoslovakian law, to support it and it really begs the question to be decided.

If then, as I would hold, the proper law of the contract is to a substantial extent that of Czechoslovakia, must it be said on that account, and notwithstanding the circumstances, that that law is also the proper law of the mode of performance in London ? Though there is no authority binding your Lordships to the view that there can be but one proper law in respect of any given contract, it is doubtless true to say that the courts of this country will not split the contract in this sense readily or without good reason. In my opinion, however, there is good ground for so doing in the somewhat unusual and, as I think, compelling circumstances of the present case.

This, however, is really part and parcel of the larger question that now emerges, namely, what is the appropriate presumption of law to apply? The choice is between the lex loci contractus and the lex loci solutionis. I would hold in favour of the latter. I think it meets the just requirements of the situation more adequately and fairly than the former. I also think it accords more closely with what may reasonably be imputed having regard to all the circumstances, including the nature of the contract—a bailment for safe custody, with, as a normal characteristic, an obligation to redeliver at the request of the bailor; the position of each of the contracting parties; the lack of any consensus, express or to be implied, in favour of Czechoslovakian law as the law of the aspect under discussion; and not least, the fact that the claim relates to the right to possession of tangible property in this jurisdiction. It is, moreover, to be observed, as a factor to be taken into consideration, though not necessarily conclusive in itself, that if the relief sought by the appellant were granted on this basis, it would not involve the Bohemian Bank, any more than it would have involved the Zivnostenska Bank, in taking any step in breach of Czechoslovakian law. The judgment desired would not necessitate collaboration or even a change of attitude on the part of the appellant's present bailee. For these reasons I think the proper law in relation to performance in London ought to be the law of England and not that of Czechoslovakia.

If that view is correct the absence of consent on the part of the National Bank affords the respondents no valid ground for withholding the certificates unless it can be said that the Czechoslovakian foreign exchange laws are, apart from any question of choice or conflict of law, to be acted upon by the courts of this country. As matters stand I think any contention of this kind must be rejected. In their defence, the respondents pleaded the Bretton Woods Agreements and the Order in Council of 1946 relating thereto (S.R. & O. 1946 No. 36). In the course of the argument, however, they admitted their inability to rest this branch of their case on any specific provision of these agreements and were content to rely on them merely to the extent of indicating in a general way that the States which were parties thereto would respect each others exchange control legislation. That might have some bearing if the question was whether the recognition of the relevant Czechoslovakian laws would be contrary to public policy in this country—a matter I have not found it necessary to discuss ;—but it cannot well have any other bearing, for these instruments do not go the length of incorporating those laws in the law of England.

I am, accordingly, of opinion, that no adverse right or interest in the Bohemian Bank or its bailees, the respondents, sufficient to defeat the appellant's claim, has been established. I would therefore allow the appeal and restore the decision of Macnaghten J.

Lord Reid : My Lords, in 1938 the appellant resided in Prague. He owned a number of securities which were held for him by a firm called Petzchek. That firm was amalgamated with the Zivnostenska Bank and on December 28, 1938, a letter was written from the Prague office of that bank to the appellant which stated, " We are crediting you with the under-mentioned " securities in the deposit account which we recently opened " for you namely :" Then follow a number of securities which were apparently held in Prague and a number of others held in New York and elsewhere. The one with which this case is concerned is thus referred to : " Safe deposit, 800 Brazil " Traction shares with current coupons, dom. London." The letter ends, " We desire to say that you will have the aforesaid " securities deposited with us for safe custody." These shares were in fact deposited with the respondents in London. On January 16, 1939, a letter was written from the Prague office of the Zivnostenska Bank to the respondents informing them that they would receive 1,164 Brazil Traction shares (which admittedly include the above mentioned 800) and asking the respondents to " take over these shares and place " them in our depot with your goodselves crediting us for " same under advice to us." The respondents were not informed and did not know to whom these shares belonged. I have no doubt that at that stage the position was that there was a contract between the Zivnostenska Bank and the appellant, and that there was no contract between the respondents and the appellant. I have not much doubt that the appellant's contract with the Zivnostenska Bank was a Czechoslovakian contract of which the proper law was the law of that country. For the purposes of this case I shall assume that that was so.

The appellant failed to escape when Czechoslovakia was overrun by the Germans and before being allowed to leave the country he was compelled to execute on or before April 1, 1939, a so-called agreement with the Bohemian Discount and Credit Bank which had become the tool of the Gestapo. By this the Bohemian Discount Bank in effect obtained complete control of the whole assets of the appellant. I have no doubt that this agreement was void as having been obtained under duress and I did not understand respondents' counsel to argue otherwise.

On April 17, 1939, the Zivnostenska Bank wrote to the respondents the following letter: " By the present we beg to " request you to withdraw from our securities account with " your goodselves 800 Shares Brazilian Traction Light & Power " Company, Ord. Cap. Stock No Par. using for this purpose " the shares which were credited to our above account on " February 6, 1939, (Ref. B 64318)—and to place same into " the depot of the Bohemian Discount Bank and Society of " Credit, Praha, with your goodselves. This transfer is made " by order and for account of the owner of these shares, " Mr. Viktor Kahler, Praha II, Vaclav. nam. 55, who transfers " his securities Account from our Bank to the Bohemian " Discount Bank and Society of Credit, Praha. The owner-" ship of the above shares remains unchanged. While crediting " you for these shares on the securities account, we " remain . . . ." The respondents acknowledged this letter by a printed form dated May 11, 1939. On the same day the respondents made an entry in their securities book under the heading, " Bohemian Discount Bank and Society of Credit, " Prague," showing that the appellant was the owner of the shares in question.

On April 1, 1939, the appellant left Czechoslovakia and he never returned to that country. It seems clear that he did not instruct the Zivnostenska Bank to write the letter of April 17, to the respondents. No doubt it was written because that bank accepted the appellant's agreement with the Bohemian Bank as a valid agreement. If the appellant had so chosen I think that he could have disclaimed this letter as having been written without his authority and could have refused to recognize the Bohemian Bank as having any rights with regard to his shares. What the result would have been it is needless to inquire because the appellant has chosen to ratify and adopt the Zivnostenska Bank's letter of April 17, 1939. This was made quite explicit in his amended statement of claim of March 18, 1948. It necessarily follows from this

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that the appellant must be held to have assented to his shares being held in the depot of the Bohemian Bank with the respondents. As the Bohemian Bank also assented to the shares being held there for their account, there must I think be held to have arisen between the appellant and the Bohemian Bank the relationship of bailor and bailee, and that is not disputed by the respondents. I agree with your Lordships that on no view of the facts can it be held that such a relationship arose between the appellant and the respondents. I think that the respondents hold the shares under a contract of bailment with the Bohemian Bank, and they cannot have a better right to refuse to deliver the shares to the appellant than the Bohemian Bank could have. The Bohemian Bank is not a party to this case, but the case cannot in my view be decided without considering what their rights are. In the circumstances I think that it is possible to consider that matter in their absence.

I find it exceedingly difficult to determine the nature and terms of the contract of bailment between the appellant and the Bohemian Bank. That contract does not arise from any express agreement, because I think that the void agreement between them made before the appellant was allowed to leave Czechoslovakia must be left out of account. The terms of the contract cannot be clearly inferred from any of the actions of the parties. But the way in which the appellant has chosen to present his case makes it impossible for him to deny that such a contract exists. I think that, once it is determined that there is a contract of bailment between the appellant and the Bohemian Bank, the decision of this case must turn on the precise nature of that contract : but to determine the precise nature of a contract of this character is a speculative enterprise and I feel no confidence in the result at which I have arrived.

The refusal of the respondents to deliver the appellant's share certificates to him can only be justified if the Bohemian Bank would be entitled to refuse to deliver. Admittedly the Bohemian Bank has no right to the shares and no claim against the appellant which would warrant a claim to retain them. A refusal of the Bohemian Bank to deliver the shares or to authorize the respondents to deliver them could only be based on the law regarding foreign exchange control in force in Czechoslovakia. There is in evidence a translation of certain regulations which are part of the law of that country. In my judgment those regulations do not come within the category of confiscatory or fiscal legislation of a foreign country which English courts cannot recognize. It is therefore necessary to determine their meaning and also to determine whether and to what extent they must be given effect in this case.

On the first question I think that it is established that the Bohemian Bank would have committed an offence under the law of Czechoslovakia if, without having the necessary permission from the Czechoslovakian authorities, they had delivered these certificates to the appellant, either in London or in Czechoslovakia, at the date when this action was raised, and would commit such an offence if they so delivered those certificates now. Such delivery would in my view be a "transfer" from a "currency inlander" to a "currency "foreigner" within the meaning of those regulations and as such prohibited unless the consent of the National Bank of Czechoslovakia had first been obtained. The question in this case really is whether that would afford a good defence to the Bohemian Bank if they were sued in England for delivery of the appellant's property which they hold for him in England.

The decision of this case as I see it turns on the question whether the appellant's contract with the Bohemian Bank must be held to be governed and interpreted by the law of Czechoslovakia or by the law of England. If the proper law of the contract is the law of Czechoslovakia then it must be assumed that that law is the same as the law of England except in so far as the contrary appears from evidence. Under the law of England performance of a contract will not be enforced if or in so far as such performance is illegal under the law of England. It must be assumed that a similar principle applies in Czechoslovakia and that if an action were raised there for delivery in London of the securities in question, even if it were held that London is the locus solutionis under the contract, that action would not succeed because delivery would involve an offence against the law of Czechoslovakia. It appears to me that if it is established that the proper law of a contract is the law of a foreign country and that the courts of that country would hold that performance of that contract cannot be enforced, an English court must also so hold unless the ground on which the foreign court would so hold is a ground which an English court ought not to recognize. I have already stated that in my opinion an exchange control regulation of the kind here in question is not within the kind of foreign law which an English court cannot recognize. It therefore follows that if the proper law of this contract is the law of Czechoslovakia the Bohemian Bank could not be required to deliver the securities. The bailment by the Bohemian Bank to the respondents was known to the appellant when he assented to the Bohemian Bank holding his property as his bailee, and it must, I think, follow that if the appellant could not succeed against the Bohemian Bank he cannot succeed against the respondents and the appeal must fail.

I turn to consider what the position would be if the appellant's contract were held to be an English contract. The law of England will not require an act to be done in performance of an English contract if such act would be unlawful under English law or if it would be unlawful by the law of the country in which the act has to be done. But I know of no authority for the proposition that an English court will not enforce performance in England by a foreigner of an act which is lawful in England merely because the law of the foreigner's country prohibits him from doing that act in England. A foreigner can only get protection in such a case if there is a term in the contract which gives it to him. So if delivery of the securities is an act which the Bohemian Bank are under the contract to do in England and if the contract is governed by the law of England, the appeal must succeed.

It is now necessary to determine what was the contract between the appellants and the Bohemian Bank. There appear to me to be three possible views about this contract: first, that it must be regarded as being similar in all respects to the appellant's contract with the Zivnostenska Bank which preceded it: secondly that the course which the appellant has taken in this action compels your Lordships to decide the case on the footing that the void agreement between the appellant and the Bohemian Bank must be regarded for the purposes of this case as valid in whole or in part: and thirdly that neither the terms of the appellant's contract with the Zivnostenska Bank nor the terms of the void agreement can be imported into this contract, with the result that the terms of this contract, in so far as not determined against the appellant by his admissions, must be inferred from the whole facts and circumstances of the case.

I recognize the attraction of the first view but I cannot accept it for this reason. The Zivnostenska contract may have contained special conditions such, for example, as those which will shortly have to be considered by your Lordships in another contract to which the Zivnostenska Bank is now a party. At least it might have contained such conditions and I think that the argument can fairly be tested by supposing that it did. I can see no ground for assuming that the Bohemian Bank agreed to take over the Zivnostenska Bank's contract whatever its conditions might be. In fact the Bohemian Bank came in under an agreement which, if they could have operated it, gave them very much wider rights. Is the appellant then precluded from asserting that the terms of his agreement with the Bohemian Bank differ from the terms of his previous agreement with the Zivnostenska Bank ? That leads me to the second view to which I have referred.

I think that it is necessary to examine the pleadings to see just what the appellant must be held to have admitted. In the original stages no reference was made to the Bohemian Bank. The first reference to it was in the defence dated December, 6 1939, where the respondents referred to the letter of the Zivnostenska Bank of April 17, 1939, which I have already quoted and pleaded : " Since the said May 11, 1939, the " defendants have held and still hold the said share " certificates to the order and for and on account of the " said Bohemian Bank." Then in an affidavit of January 15, 1940, the truth of which is admitted, the appellant told how he had been forced to sign the agreement with the Bohemian Bank. The facts there narrated appear to me to show clearly that that agreement was void and respondents' counsel did not argue either that it is valid or that the appellant is bound in this case to admit that it is wholly valid. That agreement is not again referred to. In their amended and re-amended defence the respondents continue to rely on their contract with the Bohemian Bank and state alternatively " that the plaintiff, " by transferring the said shares into a depot with the " defendants of the Bohemian Bank, submitted himself " according to Czechoslovak law to all the provisions from " time to time in force of the financial and monetary regulations " of Czechoslovakia in respect of the said shares." Finally the appellant in his amended statement of claim stated alternatively that the Zivnostenska Bank had his authority to send the letter of April 17, 1939, or that he subsequently ratified and adopted it. I have already stated that I think that this prevents the appellant from denying that there is a contract between him and the Bohemian Bank. Does it go farther and prevent him from denying either (first) that that

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contract is similar in all respects to his earlier contract with the Zivnostenska Bank or (secondly) that that contract is the void agreement and none other? These two alternatives are quite different and I can only say that I can see no sufficient reason for holding the appellant to either alternative. It is quite true that the Bohemian Bank is admitted to have succeeded the Zivnostenska Bank as the appellant's bailee, but that does not necessarily imply any particular similarity between the two contracts, and I cannot see that the appellant must be held to have admitted not only that there is a contract between him and the Bohemian Bank but also that it is in all essential respects similar to his earlier contract with the Zivnostenska Bank. Still less can I see how he must be held to have admitted that the void agreement must for the purposes of this case be treated as a subsisting contract and, as I have said, this was not argued. It was argued, somewhat faintly I thought, that the appellant had in effect adopted that part of the void agreement which authorized the Bohemian Bank to hold the shares. Subsequent partial adoption of a void contract I find to be a difficult conception which I cannot accept as applicable.

I therefore think that the problem can only be solved by considering the whole facts of the case. I think that it is fairly clear that the appellant did not think that he had made or had admitted making any contract with the Bohemian Bank: the only reason why he adopted the Zivnostenska Bank's letter of April 17, 1939, was because he thought that that course would help him to say that he had a contract with the respondents. The Bohemian Bank were trying so long as they were under German domination, to enforce the void agreement which had been obtained from the appellant before he was allowed to leave Czechoslovakia. But the fact that the parties misunderstood the legal effect of what they were doing cannot prevent the necessary legal consequences from attaching to their acts, and it is a necessary inference from their acts that a contract of bailment exists between them. That contract must, I think, be independent of the void agreement. I think that the only matters which appear with any clarity are that the Bohemian Bank with the appellant's consent hold in London for the appellant property belonging to him: moreover before the letter of April 17, 1939, the appellant had left Czechoslovakia with no intention of returning. He was probably in France at the relevant time. If that were all, there would be a contract of bailment between a bailor in France and a bailee in Czechoslovakia with regard to property held throughout in London, and I think that the inference would be that London was the place where the bailor was entitled to demand redelivery of his property. Such a contract would, I think, be governed by the law of England.

Is there anything more in the circumstances which makes it necessary to infer that the contract is of a different nature or contains other terms? It may be said that the Bohemian Bank would never have agreed to a contract which did not give them the necessary protection: that may be, though it might, perhaps, equally be said that the appellant, having just escaped from Czechoslovakia, would never have agreed to a contract which subjected his property to this control. I do not think that any help is to be got from considerations of this character. If this is to be held relevant, the argument must, I think, be that, because it is clear that, if their attention had been directed to the point, the Bohemian Bank would never have consented to become bailees except on condition that in the performance of their contract they should not be required to do something which was unlawful and punishable under the law of Czechoslovakia, therefore it must be held to be an implied term of their contract that preformance cannot be demanded in such a manner as to render them liable to such punishment. But there are no special circumstances in this case: the case for implying such a term would arise in just the same way in most if not all cases where a foreigner contracts to do something in this country, the doing of which will or may render him liable to prosecution in his own country. To give effect to this argument would, in substance, involve introducing a new principle into the law of England that it is a good defence to an action on a contract, the proper law of which is English law, for the defendant to show that his performance of his obligation in England would subject him to penal liability in his own country. No argument was submitted to justify such a principle and I would not be prepared to accept it.

It must be accepted that there is a contract of bailment between the appellant and the Bohemian Bank. The basis of such a contract can be found with some certainty: the bank, with the assent of the appellant, holds the appellant's securities for safe keeping in its depot with the respondents in London. I can find no other facts which must necessarily be taken into account in settling the nature of the contract. On that footing it is a contract under which delivery can be demanded in London and which must be governed by English law. I can find no sufficient reason for adding anything more to the contract. I realize that there are so many suppositions and hypotheses involved and there is so much unreality in the case that my conclusions may well be erroneous. But I think that there is less unreality involved in the suppositions which I have made than in any others suggested and my view would therefore be that the appeal should be allowed.

LORD RADCLIFFE: My Lords, I think that the plaintiff's appeal fails. What he asks by his appeal is that we should restore the order of the court of first instance which directed the delivery to him of 800 shares of the Brazilian Traction Light & Power Co. in the possession of the defendants: and it is that relief to which I would hold him disentitled. It is plain that we are dealing with an anomalous set of circumstances when the person who is the sole beneficial owner of property cannot obtain the aid of the law to recover its possession. To see how the anomaly arises requires some consideration of the facts of this case.

For our purposes it can begin with the letter dated December 28, 1938, which the Zivnostenska Bank at Prague wrote to Mr. Kahler at Prague, in which they stated that they were "crediting you with the undermentioned securities "in the deposit account which we recently opened for you." There followed a long list of securities, the first block of which appears to be Czechoslovakian, but of which later groups are characterized as domiciled at New York, Amsterdam and Tel Aviv. Lastly there is a group "dom. London," which includes the 800 Brazilian company shares. The letter ends with the words "we desire to say that you will have the "aforesaid securities deposited with us for safe custody."

As I take the view that we are bound to treat the Bohemian Discount Bank as having duly succeeded to the Zivnostenska Bank's obligations to Mr. Kahler as created by this letter of December 28, 1938, it is well to pause to state what I interpret them as being. Certainly there was a bailment. The bank had the safe custody of the securities and the right to possession until the bailment was determined. We know from Mr. Kahler's affidavit of July 31, 1939, that the Brazilian company shares had always been deposited in London and I think that we may safely treat the bailees as having at any rate authority to retain them there. In the absence of any direct evidence of custom or any challenge by Mr. Kahler as to the propriety of what they did, I think that we may also treat their authority as allowing the deposit in London either with a banking correspondent, such as the Midland Bank, by sub-bailment or with their own London branch, if they had one. The shares are described as " with current coupons " and I suppose that we must envisage the depositary's duties as including the detachment of coupons on maturity, the collection of dividend in London and the transmission of it to Prague or elsewhere as directed. In this respect the contract is more than a mere contract of bailment. It was so much of a gratuitous bailment (since the bank, though they may have charged for their services, were in no sense hirers) as to be terminable at the will of the bailor; upon which event of termination the bailees would become responsible to deliver the shares to the bailor or as he should direct. It follows that, so far as the contract of bailment was concerned, Mr. Kahler could properly be said to have the right to recover immediate possession from the bank.

So far as the contract of bailment was concerned. But at the time when the letter of December 28, 1938, was written, as now, the law of Czechoslovakia had imposed a restriction on the duty of a bailee under such a contract to redeliver on demand. That is proved by Dr. Hartmann's evidence. The restriction consisted in the currency regulation that forbade, among others, a holder in safe custody of foreign securities to transfer his possession without the consent of the National Bank. The terms of this regulation ought not to be treated as being themselves part of the contract: but, on the other hand, I do not know how to regard their legal significance except as modifying the relationship of any bailors and bailees who ought to be treated as having measured their rights and obligations under the bailment by the Czechoslovakian system of law.

Now, the proper law of the contract between Mr. Kahler and the Zivnostenska Bank was, as I see it, the law of Czechoslovakia. The arrangement was made in that country by two persons there resident and subject to its laws. The securities were held on the deposit account which Mr. Kahler opened with the Bank in Prague and it was with that branch therefore that he would have to clear the matter if he wished be taken into account in settling the nature of the contract. On that footing it is a contract under which delivery can be demanded in London and which must be governed by English law. I can find no sufficient reason for adding anything more to the contract. I realize that there are so many suppositions and hypotheses involved and there is so much unreality in the case that my conclusions may well be erroneous. But I think that there is less unreality involved in the suppositions which I have made than in any others suggested and my view would therefore be that the appeal should be allowed.

LORD RADCLIFFE: My Lords, I think that the plaintiff's appeal fails. What he asks by his appeal is that we should restore the order of the court of first instance which directed the delivery to him of 800 shares of the Brazilian Traction Light & Power Co. in the possession of the defendants: and it is that relief to which I would hold him disentitled. It is plain that we are dealing with an anomalous set of circumstances when the person who is the sole beneficial owner of property cannot obtain the aid of the law to recover its possession. To see how the anomaly arises requires some consideration of the facts of this case.

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A few months later Mr. Kahler left Czechoslovakia. The price of exile that was extorted from him was the transfer of all the securities that he possessed to the control of the Bohemian Bank. There is no reason to doubt that the German authorities then in power in Czechoslovakia intended that the securities should be liquidated in due course and the proceeds appropriated for their own purposes. On March 29, 1939, Mr. Kahler signed the required agreement with the Bohemian Bank and on April 17, 1939, the Zivnostenska Bank, no doubt in consequence of this agreement, notified the Midland Bank that the 800 Brazilian company shares should be placed "into the depot of the Bohemian Discount Bank and Society "of Credit, Praha, with your good selves. This transfer is "made by order and for account of the owner of these shares, "Mr. Viktor Kahler, Praha II, Vaclav. nam. 55, who transfers "his securities account from our bank to the Bohemian "Discount Bank and Society of Credit, Praha. The ownership "of the above shares remains unchanged."

The effect of the agreement of March 29, 1939, and of this letter was much debated before us. I will content myself with saying that in my view the form of the plaintiff's statement of claim, as finally amended during the hearing in the Court of Appeal, leaves us no option but to treat the transfer of his security deposit account to the Bohemian Bank as a valid and proper transaction. Of course, other views of the legal effect of the whole arrangement might be taken. I do not think that they are open to us. I have no doubt that the plaintiff's advisers considered the alternative views and adopted that which seemed to them to give his case the best chance of success.

But what is the consequence? I think that we must treat the Bohemian Bank as having been validly substituted for the Zivnostenska Bank as the bailees of Mr. Kahler's shares and as holding them for him upon a deposit account similar in all respects to that which was transferred to them by the letter of April 17, 1939. I think that the proper law of that new bailment was necessarily that of Czechoslovakia. No doubt Mr. Kahler, who was leaving Czechoslovakia, perhaps for ever, would have chosen some other law had he been free to choose. What the bank would or could have accepted is another matter. But in truth the speculation seems to me aimless for, had Mr. Kahler been free to choose, he would not have transferred his account to the Bohemian Bank at all. If we are to assume, as Mr. Kahler's case requires us to assume, that the securities were properly transferred from the Zivnostenska Bank's depot with the Midland Bank to the Bohemian Bank's depot with them, then I think that the law of the new bailment, as the law of the old bailment, was the law of Czechoslovakia.

Mr. Kahler now sues the Midland Bank for the delivery of his securities. His claim was discussed before us as a claim in detinue. I think that it was rightly so described, but the answer of the Midland Bank would have been the same if his claim had been based on trespass or trover. First, he says that he is in direct contractual relation with the Midland Bank and that his contract, being a terminable contract of bailment, entitles him to call for the delivery of his shares. The Court of Appeal have rejected his claim to be in any direct contractual relation with the Midland Bank. I agree with them in all that they say on this head and I do not think it necessary to add anything. Secondly, he says that he is the absolute owner of the shares, that the Bohemian Bank claim neither lien over nor interest in them, and that therefore he is entitled to the immediate delivery of what, after all, belongs to him and to no one else.

To this the Midland Bank reply that he is not entitled to the immediate possession of the shares, and that if he is not so entitled his claim must fail. It is not in dispute that the National Bank, having been applied to, have refused to consent to the release of the shares from the Bohemian Bank to Mr. Kahler. But it is important that the Midland Bank's objection is not based on the fact that they hold the shares to the order of the Bohemian Bank and that they cannot obtain that bank's consent to the delivery to Mr. Kahler. If Mr. Kahler had indeed the immediate right to possession, the Midland Bank's possible embarrassments with the Bohemian Bank would not, as I see it, afford any defence, unless they could successfully establish that his authority to the Bohemian Bank to place the shares with them estops him from calling on them to ignore that bank's refusal of consent. That line of argument has not been pursued before us and I do not consider it further.

What the Midland Bank rely on is a defect in Mr. Kahler's title to immediate possession. Here I think they do no more than assert a familiar legal principle. An action in detinue will not lie at the suit of a plaintiff who has not that title. It would be an anomaly that the court should by its order transfer property into the hands of one who has not a legal right to immediate possession. It is true that in the case of a bailment which is terminable at the bailor's will the law will give the right of action to the bailor as well as to the bailee; but then such a bailor has nothing less than a right to immediate possession. On the other hand a person may have all the existing rights of ownership in a chattel and yet have no claim in detinue if by contract he is not entitled to immediate possession: see *Bradley v. Copley* (1).

So it is Mr. Kahler's right to possession that must be tried. By contract he has agreed that the Bohemian Bank should hold his shares in safe custody for him. There is nothing in the contract that would prevent him from calling for the shares at any time; but the law of Czechoslovakia to which the contract is subject has so far modified his right so to recover possession of the shares as to make the consent of the National Bank a condition precedent. If, then, the courts of this country are to recognize that modification, Mr. Kahler lacks a present right to possession. It seems to me that we should ignore an established rule of our private international law if we were not to give effect to the currency regulation in question. If the proper law of the contract is the law of Czechoslovakia, that law not merely sustains but, because it sustains, may also modify or dissolve the contractual bond. The currency law is not part of the contract, but the rights and obligations under the contract are part of the legal system to which the currency law belongs. So to decide is to give effect to the same principle as was upheld by our courts when the United Kingdom Government's obligations under its American loan of 1917 were treated as modified by American legislation (see *R.* v. *International Trustee for the Protection of Bondholders A/G* (2), or when Mr. Perry's life assurance policy was annulled by supervening legislation in the U.S.S.R. (see *Perry* v. *Equitable Life Assurance Society of the United States of America* (3)).

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(1) 1 C. B. 685.

(2) [1937] A. C. 500.

(3) (1929) 45 T. L. R. 468.

H. L. (E.)

1949

KAHLER
v.
MIDLAND
BANK LD.

Lord Radcliffe.

For my part, I should not regard the application of this principle to this case as a concession of extra-territorial operation to foreign currency regulations. I should regard it rather as an insistence that in applying the proper law of a contract—a conception which is inescapable in private international law—it is the full complex of substantive law that must be applied. The difficulty more often lies in the attribution of the proper law. But, however, that may be, I should not have been prepared to treat such currency regulations as we are concerned with here as if they were no more than the "penal "or revenue laws" of another State the existence of which our courts are traditionally disposed to ignore.

It follows from what I have said that I think that we are bound to treat Mr. Kahler as having ceded the lawful possession of his shares for an existing though indeterminate period; and to hold him accordingly disentitled to the relief that he claims. In the result I have said no more on this head than was said in the Court of Appeal by the present Master of the Rolls and by Scott L.J.: but I think that it may be important in this peculiar case to emphasize that, in my opinion, it is not the Midland Bank's failure to get their customer's consent to hand the shares to Mr. Kahler that affords them defence but the defect in Mr. Kahler's own right to immediate possession.

Appeal dismissed.

Solicitors for appellant: *Herbert Smith & Co.*
Solicitors for respondents: *Simmons & Simmons.*

H. L. (E.)*

1949

June 22, 23, 27; *Oct.* 20.

ZIVNOSTENSKA BANKA NATIONAL CORPORATION . . . . . APPELLANT;

AND

FRANKMAN . . . . RESPONDENT.

Banking—Private international law—Contract—Deposit of bonds—English office of foreign bank—Foreign bonds deposited by head office on behalf of foreign national—Devolution of title on naturalized British subject resident in England—Claim for delivery of bonds

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**Present*: LORD SIMONDS, LORD NORMAND, LORD MACDERMOTT, LORD REID and LORD RADCLIFFE.

H. L. (E.)

1949

Zivnostenska Banka National Corporation
v.
Frankman.

in England to owner—Refusal by bank—Bank's conditions of business—Construction—System of law applicable—Lex loci contractus—Lex loci solutionis.

Before 1935 a Czech national resident in Czechoslovakia bought in London, through a Czech bank with its head office in Czechoslovakia, certain debenture bonds issued by a Czech company and, with his consent, they were deposited at the bank's London branch, of which he was not a customer. On his death in 1935 his sister, P. F., who was also a Czech national, then domiciled and resident in Czechoslovakia, became entitled to them. In 1938 she opened a current account with the bank's Prague branch and was informed that the bonds, of which she was the owner, were deposited at the London branch; she was also sent the bank's conditions of business. Condition 11 was as follows: "As regards such stocks and securities as were purchased at a "stock exchange other than that of Prague . . . . we shall "not have the same sent to us unless the customer has ordered "the transmission thereof at his own expense and risk, but will "leave the same at the risk and expense of the customer, deposited "with our correspondent where they shall be subject to the "legal measures of the respective country . . . ." Condition 50 was as follows: "The place of performance and payment in "respect of all obligations resulting from the business connexion "between us shall be considered to be the place of that department "of our establishment which has carried out the relevant trans- "action with the customer except in so far, however, as any "special stipulation has been made in this connexion." In March, 1939, P. F., came to England, residing there till her death in 1945, when her son, H. F., who was resident in England and was a naturalized British subject, became administrator of her estate, being also sole beneficiary, and asked the London branch to deliver the bonds to him. This was refused on the following grounds: (1.) by the Czech Foreign Exchange Law of 1946, an "exchange citizen" could only transfer securities to an "exchange "foreigner" with the permission of the National Bank of Czechoslovakia; (2.) the head office of the bank was an "exchange "citizen" and H. F. was an "exchange foreigner"; (3.) permission of the National Bank of Czechoslovakia was therefore necessary before the bank, through its London branch, could deliver the bonds to H. F. but this permission had been refused.

Held, that the law of Czechoslovakia was the proper law of the contract and since by that law the bank could not legally deliver up the debentures, delivery up should not be ordered.

Decision of the Court of Appeal (sub. nom. *Frankman* v. *Prague Credit Bank*) [1949] 1 K. B. 199, reversed.

Appeal from the Court of Appeal (Lord Goddard C.J., Asquith and Singleton L.JJ.).

The facts, stated by Lord Simonds and Lord Reid, were as follows: The appellant bank, now known as Zivnostenska

Banka National Corporation and hereinafter called "the "bank," was incorporated in 1922 under the laws of Czechoslovakia with the name of the Anglo-Czechoslovak and Prague Credit Bank. Its head office was in Prague. In 1924 it established a branch in London at 48 Bishopsgate. Its name was changed first to Anglo-Prague Credit Bank, then to Prague Credit Bank, and ultimately to its present name. At the outbreak of war in 1939 the bank became an enemy for the purposes of the Trading with the Enemy Act, 1939. On September 12, 1939, a licence was granted by H.M. Treasury to the London branch to carry on the business of the branch and it did so until December 30, 1946, under the name of the Anglo-Prague Credit Bank London Office, under which name it was originally sued in the proceedings out of which this appeal arose. At the end of 1946 the bank had ceased to be an enemy within the meaning of the Act and permission was given by H.M. Government for control of the branch to be resumed by the bank.

In October, 1930, a branch of the bank at Trautenau in Czechoslovakia bought for the account of a Dr. Weiner, who lived there, 300*l*. 6 per cent. Skoda Works debentures, notifying him of the fact by letter dated October 14, 1930, of which the following were the material passages translated from the German: "We beg to inform you that in accordance with "your instruction of the 8/10/1930 we have bought for your "account the undermentioned securities, for which we have "debited you according to statement. We are crediting "you with the securities on your securities account. At "the same time we take note of your authorization to deal "with the securities enumerated below as we choose, and to "deposit the same as we think best, even abroad. We do "not mention to you the name of our foreign correspondent "with whom the securities acquired and mentioned below, "are deposited, following your declaration according to which "you exempted us from our obligation to do so." The statement exhibited to the letter showed that the debentures had been acquired on the London Stock Exchange. It was conceded that Dr. Weiner was never the registered holder of them. But debentures to the nominal value of 300*l*. of Skoda Works were (together with a large number of other debentures of the same issue) registered in the names of nominees of the bank and were held by the London branch in safe custody to the order of the head office of the bank in Prague. Dr. Weiner was at no time a customer of the London branch, which did not know his name in connexion with these debentures.

In or about 1935 Dr. Weiner died intestate and his sister, Mrs. Paula Frankman, succeeded to his estate, which included the 300*l.* debentures in question. Before March, 1935, she had by some means acquired 400*l.* similar debentures. She too had lived at Trautenau and had an account with the Trautenau branch of the bank but in 1935 she moved to Prague and transferred her account to the head office in that city. On March 22, 1935, the head office wrote to her a letter in German of which the following was a translation:

"22.3.38.

"Mrs. Paula Frankman,
"Prague 2,
"Smecky 26,
"Ladies Club Register.

"We beg to inform you that by order of our Trautenau "branch we credit you with 8220 700*l.* 6% Skoda Works "Debentures Cum. Coupon 1/6/1938, 3/100 Nos. 261991–3 "4/100 Nos. 272422–24 and 268606 on your "deposit account with us held in London. We enclose in "addition to our business conditions a declaration con-"cerning the deposit of the securities abroad and specimen "signature forms which please return to us duly completed.

"Assuring you of our best attention at all times,

"We remain,
(Signed)
"ANGLO-PRAGUE CREDIT BANK."

The form of declaration accompanying the letter contained terms authorizing the bank "to deposit even abroad at "your discretion" the securities which they held. The following is a translarion from the German of extracts from the business conditions:

Condition 11: "As regards such stocks and securities "as were purchased at a Stock Exchange other than that "of Prague or were received by any bank other than a "Prague bank, we shall not have the same sent to us unless "the customer has ordered the transmission thereof at "his own expense and risk, but will leave the same, at the "risk and expense of the customer, deposited with our "correspondent, where they shall be subject to the legal "measures of the respective country; this also applies "in the case of our having credited the principal with such "securities on a securities deposit account. In the event "of our entrusting any securities to or leaving them in "the custody of any third party—provided, of course, "that we are otherwise authorized so to do—we shall only "be responsible for our diligence in selecting the depositary, "naturally subject to the provisions of the Law of October 10, "1924, No. 241, of the Collection of Laws and Decrees."

Condition 50: "The place of performance and payment "in respect of all obligations resulting from the business "connexion with us shall be considered to be the place "of that department of our establishment which has carried "out the relevant transactions with the customer, except "in so far as any other special stipulation has been made "in this connexion."

It appeared that Mrs. Frankman did not answer the letter of March 22 nor sign the declaration, for on April 27 the head office sent her the following letter: "As you have not returned "to us the declaration form sent to you on the 16th ultimo [sic] "relating to place of custody of your 700*l*. 6% Skoda Works "debentures we have to inform you that the above mentioned "securities are deposited with our branch in London. "Requesting you to take note of this fact."

On May 24, 1938, the head office sold 400*l*. of the 700*l*. debentures and credited the account of Mrs. Frankman in Prague with the equivalent in kronen of the net proceeds. Similarly her same account was credited with interest on the remaining 300*l*. debentures on May 30 and December 1, 1938.

In March, 1939, Mrs. Frankman came to England and there lived until she died in August, 1945. Her son, the respondent, Hans Frankman, had come to England in 1935 and he became a naturalized British subject in 1945. Letters of administration of his mother's estate were granted to him on May 24, 1946. He was also sole beneficiary. In the capacity of administrator he required, through his solicitors, the London branch of the bank to deliver up the debentures to him. Some question at first arose as to a possible claim by the Custodian of Enemy Property, but this difficulty was removed and it remained only for the London branch to obtain the consent of the head office, for which the debentures were held in safe custody, to deliver them to the respondent. The consent was refused: without it the London branch declined to act and accordingly the respondent commenced an action against the bank claiming the return of the debentures or their value and damages for their detention. This claim was in the appropriate form of an action of detinue, but ignored the fact that the debentures being registered in the names of nominees of the bank, further relief was required beyond that claimed, if the debentures were to become effectively the property of the respondent.

The ground of the refusal of the bank, which asserted no beneficial interest in the debentures, was that under and by virtue of Czechoslovak finance regulations (viz., Foreign Exchange Law No. 92 of April 11, 1946) delivery of them by the bank to the respondent was only permissible with the consent of the National Bank of Czechoslovakia and that that consent had been asked for by the bank and had been refused.

At the trial Dr. Otto Kulhanek, a doctor of law of Prague University, was called as an expert in the law of Czechoslovakia. He said that it would not be possible under Czech law for the bank to hand over the debentures to the respondent without the permission of the National Bank of Czechoslovakia. The head office of the bank in Prague was an "exchange "citizen" but the branch in London was an "exchange "foreigner." The respondent and his mother, Mrs. Frankman, after she began to reside in England, were "exchange "foreigners." Czech law did not, as between two exchange foreigners, prohibit the transfer of securities held outside Czechoslovakia. The fact that the debentures were physically deposited in London was irrelevant in Czech law. The head office in Prague held the debentures for Mrs. Frankman. This was therefore a transaction between an "exchange "citizen" and an "exchange foreigner" and could only be allowed with the consent of the National Bank of Czechoslovakia.

Cassels J. gave judgment for the bank. The Court of Appeal reversed this decision and by an order, the terms of which were agreed to by counsel on both sides, it was ordered that judgment be entered for the respondent for the return of the three debenture bonds, with costs to include his costs of the appeal, and that the bank should execute and deliver to him all such documents as should be necessary to enable him to procure the transfer of the bonds into his name. Leave was given to the bank to appeal to the House of Lords on an undertaking that on the hearing of any such appeal they would not oppose an application by the respondent for costs to be paid by the bank as between solicitor and client in any event and that the order of the Court of Appeal as to costs in that court should not be disturbed.

Sir Valentine Holmes K.C. and *J. P. Ashworth* for the appellant bank. The two questions in this case are rightly set out in the respondent's printed case, viz., " (*a*) Whether " the law applicable to the contract under which the appellants " hold the said bonds for safe custody is Czechoslovak law " or English law; (*b*) If it should be held that the law " applicable is Czechoslovak law, whether, by reason of " certain Czechoslovak currency regulations . . . . the appellants are prevented from returning the said bonds to the " respondent except with the consent of the National Bank " of Czechoslovakia (which consent has been refused)." The Court of Appeal held that the proper law of the contract was Czech but that, by reason of condition 11, English law applied to delivery by the London office to the appellant; they did not deal with the second question. Cassels J. dealt with the second question, deciding it in the appellants' favour. This contract must be interpreted according to Czech law, which is the proper law of the contract. Even if the lex loci solutionis was England the proper law of the contract would still be Czech for the purpose of construing the contract and finding its effect. Condition 11 does not assist the respondent. It refers to " our correspondent " but nothing in it can be taken as referring to a branch of the bank. It cannot be read together with condition 50, which does little more than state what would have been the law without it. Under the contract between the bank and Mrs. Frankman, the bank was under no obligation to deliver the debentures to her in London. The respondent can have no better claim to delivery than could she and the only claim she could have put forward was one based on the contract made in 1938. This was made in Prague with the head office of the bank in Prague and provided that the place of performance for all obligations should in the circumstances be Prague. Having regard to condition 50, it is irrelevant where the debentures were in fact held in safe custody, the only obligation on the bank was to deliver them to Mrs. Frankman in Prague. A similar case has been decided in the United States of America in favour of the bank: *Kraus* v. *Zivnostenska Banka* (1). [They also referred to the Czecho-Slovakia (Settlement of Financial Claims) Order, 1940 (St.R. & O. 1940, No. 308).]

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(1) (1946) 64 New York Sup. 268.

J. P. Ashworth following. The question is whether the circumstance of deposit in London gives rise to a relation between the London branch and the depositor so as to create an obligation to redeliver in London. The matter can be illustrated by three possibilities: (*a*) A customer of the Westminster Bank at the Temple Bar branch, having deposited a share certificate there, moves to Liverpool. He has no right to require redelivery at the Liverpool branch because the obligation is localized at Temple Bar. (*b*) A share certificate having been deposited at the Temple Bar branch, the bank, on the outbreak of war, moves securities to a safer area at Cheltenham and the customer, on being notified, assents. That does not alter the contract between the customer and the bank, save that he could not demand immediate delivery at Temple Bar. He could not demand delivery at Cheltenham, for he is not a Cheltenham customer. (*c*) At the request of the customer the share certificate is transferred to the Liverpool branch, and he thereby becomes a customer of that branch, becoming entitled to demand delivery there and ceasing to be entitled to demand delivery at Temple Bar. Here the customer of the bank in Czechoslovakia was informed that the bonds were physically in London. (This corresponds to the second illustration.) The obligation to redeliver only existed between the bank at the branch in Prague and the customer there. The mere fact that information had been given that the bonds were in London would not create an obligation to redeliver them there. The position is not the same as when there is an agreement with the customer to hold them abroad, because then the customer becomes the customer of the branch abroad. That would be dealt with by condition 50. The observations by Lord Goddard C.J. at the end of his judgment (1) cannot apply to Mrs. Frankman's situation. If she had not come to England but had asked at Prague for the securities to be brought over to her there, the demand could not have been refused.

Laski K.C., *George Maddocks* and *Robert Thompson* for the respondent. This should be dealt with as a general problem arising out of the relationship of bailor and bailee. That was the relationship created between Mrs. Frankman and the bank for the safe custody of the bonds. The contract was one for safe custody for the benefit of the depositor, and imported (*a*) safe custody, and (*b*) return to the bailor of the thing bailed. Such a bailment is different from a bailment of hiring, which enures for the benefit of the bailee in that he has the use of the article. In the case of a bailment of deposit there is a contract, express or implied, that the goods shall be returned as soon as the purpose of the bailor is fulfilled. The only desire of Dr. Weiner and Mrs. Frankman was the safety of the bonds. In requiring the return of the thing bailed the bailor cannot detract from the bailee's reward or impose on him a burden greater than that imposed on him by the contract of bailment. Thus, for example, if goods are deposited with a bailee for six months and the bailor wishes to get them out before the period has elapsed, he can do so provided he pays for all the time for which he has contracted, not detracting from the stipulated reward. When once the place of deposit and the person of the depositee is chosen the bailee cannot change either and if he takes the goods to a different place from that contracted for, he is guilty of a breach of contract. The bailor, on the other hand, is entitled to waive any term that enures to his advantage. In this case, for example, though the bonds were, under the contract, deposited in London, Mrs. Frankman could have had them delivered to her in Prague, if she gave a direction to that effect, paid the expense and took the risk. The deposit in London was made under a special contract with Mrs. Frankman and it was a necessary term of the contract that she could get the bonds whenever she chose. By Czech as well as English law, the primary duty of a depositary at will is to return the thing deposited on demand. In contracts of bailment one deduces from the circumambient circumstances what the intention of the parties was. [They referred to Storey on Bailments (9th ed.) pp. 123–5, paras. 1117–9; Halsbury's Laws of England (2nd ed.), vol. I., pp. 724–7, paras. 1196–8; and Beal on Bailments (1900 ed.) pp. 82–3.] There is nothing in the Czech Foreign Exchange Law to prohibit the termination of the contract of bailment in this case, unless it can be shown that there is a compulsion for the bonds to go back to Prague, for both the respondent and the London branch are "exchange foreigners" and delivery in London to the respondent by the London branch is no offence under Czech law. The Czech Law of 1946 does not avoid contracts as such but only prohibits particular transactions.

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(1) [1949] 1 K. B. 199, 205.

In the circumstances, the London branch can hand over the bonds without any direction from Prague. Condition 50 of the bank's conditions of business is confined to money transactions and does not apply to deposits of securities for safe custody. In position it is far removed from the group of conditions, including condition 11, which deal with that topic, so that condition 50 must be taken to relate to topics in its own vicinity. Even if it does apply to such deposits it must be construed contra proferentem. It is ambiguous and if there is a construction which will enable the respondent to obtain his unencumbered property in London, the bank cannot take advantage of some other construction. Assuming that condition 50 applies, the " establishment " is the head office in Prague and the " department " which " carried out " the relevant transactions " (i.e., the safe keeping of the bonds) is the London branch. The letters from the bank amount to a " special stipulation " made in connexion with the transaction. The " special stipulation " was to buy the bonds in London and keep them at the branch there. Condition 50 cannot be invoked by the bank to establish that the law applicable is the municipal law of the branch that carried out the transaction (viz., Czech law). By condition 11 the law governing the contract of deposit is English law, whatever may be the law governing the contract under which the debentures were bought. The bank's construction of condition 50 is inconsistent with the provisions of condition 11 which relate to the law applicable if bonds are deposited with a correspondent outside Czechoslovakia. The words " where they shall be subject to the legal measures " of the respective country " are apt to include the specific laws in force and the legal position obtaining in England at the relevant time, in relation to the deposit of bonds; they exclude the law of Czechoslovakia. They mean that the rights of the parties under the contract with regard to these bonds is to be governed by the law of the country where they are deposited at least for so long as they remain deposited there. Condition 11 imports a term that if the bonds are deposited out of Czechoslovakia and the customer does not order their transmission from the place where they are situated, the bank is obliged to let them stay there, so that delivery can be validly demanded from the foreign correspondent, without regard to the law of Czechoslovakia. Here London is the place of redelivery, the locus solutionis. The bank

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cannot of its own motion send the bonds back to Prague unless the customer orders it, undertaking the expense and risk. There is no obligation on the customer to order the transfer of the bonds from London to Prague but if condition 50 operated as the appellants contend, the respondent's refusal to allow such a transfer would involve the complete sterilization of his property. The Czech exchange regulations are concerned not with rights but with transfers. The transfer in this case might concern the Czech State if the locus were changed from London to Prague, but Czech law is not relevant as between the respondent and the London branch. A third party, the Czech State, which has nothing to do with this transaction, should not be introduced, the transaction being between exchange foreigners. [They referred to *Tallinna Laevauhisus A/G* v. *Estonian State Steamship Line* (1).] London is the overriding factor in this case. The law of England is the lex loci solutionis and under condition 11 it is the general law applicable to the bailment. The purchase of the bonds and the deposit of the bonds are the two transactions relevant to be considered under that condition. The three examples put forward by the appellant bank's counsel are correct as stated but do not apply to the circumstances of this case. Further, even if Czech law were the proper law of the contract, yet the English courts will not enforce these exchange regulations because they are penal and confiscatory. On the point of costs, this is a case of great general importance to banks and only individual importance to the respondent and accordingly he should be allowed his costs in any event in all the courts, including the court of first instance: see the order made in *Christie* v. *Leachinsky* (2).

George Maddocks following. The essential nature of this transaction depends on the meaning of the contract and where it has to be performed. The essential transaction is to hold the securities at the disposal of the customer in London. Before delivering them up to the person claiming to be entitled, the bailee is only entitled to demand evidence of title; he cannot require the customer to obtain permission from some third party in order to perfect his title. (There is a distinction between investigation of title and requiring perfection of title.) See Storey on Bailments (9th ed.), pp. 123–4, para. 117. A binding obligation is imposed by the fact that London is the place of deposit and delivery.

(1) (1946) 80 Ll. L. Rep. 99, 107.

(2) [1947] A. C. 573.

The bank is bound by its own declaration and the de facto position is that the bonds are in London. The head office was the agent of the bailor to create privity of contract with the London branch. The bonds are in London under a "special stipulation" within the meaning of condition 50, whereby they were taken out of the Czech jurisdiction and accordingly condition 50 does not apply. Even if condition 50 applies, it does so, in such a way that "the place of performance" is London. No international bank could carry on business if the customer requiring delivery of securities deposited in London should have to go to Prague to obtain it. Even if the respondent was an "exchange citizen" of Czechoslovakia, he could have demanded delivery of these bonds at his own risk of the consequences to him in Czech law.

Sir Valentine Holmes K.C. in reply. This is not a gratuitous bailment solely for the benefit of the respondent. Both the bailor and the bailee regarded the contract as for their benefit. The question is: What are the terms of the contract? There is no difference between a contract of bailment and any other contract. As to redelivery, though in principle a bailor can ask for his chattel back before the time stipulated, in such a case, e.g., when furniture is stored at Pickford's, it may be so placed that it cannot easily be got at in the warehouse before the full time has elapsed. The thing bailed cannot be required to be delivered at a place other than that stipulated. Here there was a contract to redeliver in Prague and there was no special stipulation to redeliver in London, ousting condition 50. The letter referring to London was sent merely for information. Condition 11 deals with custody prior to delivery up but not with delivery up. Under that condition it was the securities deposited abroad that were to be "subject to the legal measures of the "respective country." The proper law of the contract remained the law of Czechoslovakia. The material time in considering what a contract means is the time when it was made; then the bailor was in Czechoslovakia. The head office was not an agent for the bailor to create privity of contract with the London branch, which is not itself a legal entity.

Their Lordships took time for consideration.

Oct. 20. LORD SIMONDS. My Lords, this appeal from an order of the Court of Appeal which reversed a decision of

Cassels J. raises a question of some importance to bankers, though, as I think, its solution will be found to depend on the language of the particular documents by which the transaction to be considered by the House was carried out. The short question is whether the respondent Hans Frankman is, as the Court of Appeal held, entitled to have returned to him through the London office of the appellant bank three debenture bonds for 100*l.* each issued by a Czechoslovak company known as Skoda Works, and further to have executed by nominees of the appellant bank in whose names the bonds are registered all such transfers as are necessary to perfect his title to them. I shall for convenience refer to the appellant bank, now known as Zivnostenska Banka National Corporation, as "the bank." [His Lordship stated the facts and continued:]

The ground of the refusal by the bank, which asserted no beneficial interest in the debentures, was that under and by virtue of Czechoslovak Finance Regulations (viz., Foreign Exchange Law No. 92 of April 11, 1946) delivery of them by the bank to the respondent was only permissible with the consent of the National Bank of Czechoslovakia and that that consent had been asked for by the bank and had been refused. The single question for the consideration of the House is whether the ground of refusal is a valid one and at this stage I must return to the "business conditions" which so far as they are relevant govern the contractual relations of the parties. I do not understand it to be questioned that the rights of the respondent in relation to the bank are not different from those of his mother through whom he claims.

Of the business conditions which were enclosed in the bank's letter to Mrs. Frankman of March 22, 1938, two only need be quoted, conditions 11 and 50. It was suggested that condition 50 had no relevance to a transaction which in part consisted of the keeping of bonds in safe custody for a customer, but I see no ground for this suggestion. [His Lordship read the conditions.] I think that it clearly emerges from these conditions of a contract, made, it is to be remembered, between a bank in Prague and a Czechoslovakian citizen then resident at Trautenau, that first and last the law of the contract was Czechoslovakian law. It was the head office which carried out the "relevant transaction" with Mrs. Frankman and accordingly the place of performance in respect of all obligations under the contract was under condition 50 to be considered to be at the head office. Beyond all doubt the lex loci contractus was that of Czechoslovakia; if, as condition 50 prescribes, the locus solutionis is deemed to be Prague, so also must the lex loci solutionis be the law of Czechoslovakia. It appears to me probable that it was largely in order that the bank might assert the applicability from first to last of the municipal law of that branch which carried out a transaction, that condition 50 was made a term of the contract. But it is said that this view is inconsistent with condition 11 if under that condition securities are deposited with a correspondent of the bank outside Czechoslovakia. Two points are made. In the first place it is contended that the provision that in such a case the securities shall be "subject to the legal measures of the respective country" excludes the application of the law of Czechoslovakia. I do not think that this is so. I do not read the provision as affecting the legal rights or obligations of the parties except so far as may be necessary for the protection of the bank. It might be laid to their charge that they had not taken due care of securities left in their custody, if, being deposited with a correspondent in another country, they became subject to some penal or confiscatory measure. It is, I think, to avoid the possibility of such a liability that the bank makes this provision. Secondly it is said that condition 11, where it operates, imports a contractual term that, if securities are deposited with a correspondent of the bank in a foreign country (say, in London) and the customer has not at his own risk and expense ordered their transmission to Czechoslovakia, or, presumably, to some other place, then the bank remains under an obligation to let them remain where they are and (as a corollary) delivery can be validly demanded from that foreign correspondent. Then, it is said, the performance of the bank's obligation must take place, in the example given, in London, and the law applicable to such performance must be the law of England. This is, I think, the view of the transaction taken by the Court of Appeal. But, apart from the fact that this view ignores condition 50, which is to me conclusive, I cannot accept the interpretation of condition 11 on which it is founded. I think that this condition excuses the bank from liability if, in the absence of instructions to the contrary, they think fit to leave securities with their correspondent abroad, whether a branch or an independent depositary, but I do not think that the condition denies them the right to have them transmitted to Czechoslovakia, if in their discretion they think that a safer course to take. Clearly, I think, the customer could under these conditions demand delivery in Prague, though a question might then arise whether, if the securities were in London at the time of demand, the transmission to Prague should not be at his risk and expense. I do not doubt that in such a case it might as a matter of practical convenience, if the customer so wished, be arranged that the delivery should take place wherever the securities happened to be, but this does not mean that, as a matter of legal obligation, the bank are bound by these conditions to keep securities abroad or to deliver them up in any place except at the office where the transaction is carried out. If the conditions were different, so might be the result. That is why I said at the beginning of this opinion that the issue of this case turned on the particular instruments by which the transaction was carried out. It follows from what I have said that in my opinion the proper law of the contract by which the rights and obligations of the parties are determined is in every aspect of it the law of Czechoslovakia.

Upon this assumption I think that the judgment of the Court of Appeal cannot stand. In common with other nations the Czechoslovakian State has from time to time made laws for the protection of its currency and for the control of foreign exchange. I have already referred to the law in force at the relevant date, viz.: the Foreign Exchange Law No. 92 of April 11, 1946, which substantially re-enacted earlier laws. The evidence of a Doctor Kulhanek, who was called as an expert in the law of Czechoslovakia, proved that it was illegal by that law for the bank to part with the securities in question to the respondent without the leave of the National Bank of Czechoslovakia, which leave, as I have already said, had been withheld. The fulfilment of the contract therefore involves the doing of an act in Czechoslovakia, viz.: either the actual delivery of the securities or the giving of an authority for their delivery, which is by the law of Czechoslovakia, itself the law of the contract, illegal. It is, I think, clear that the courts of this country will not enforce such performance: see *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (1), and contrast *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie A/G* (2).

It was urged that, even if the law of Czechoslovakia was the proper law of the contract and by that law the bank could not legally deliver up the debentures, yet the courts of this country should not enforce that law. It was sought to apply to the circumstances of the present case the principle that an English court will not enforce a penal or confiscatory law of another country. I do not exclude the possibility of this principle applying where it appears that the law, which is sought to be enforced or relied on, is in reality confiscatory though in appearance regulatory of currency. But I see no reason why it should be applied in the case of a law which does not appear to differ in material respects from the legislation contemplated by the Bretton Woods Agreement which is now part of the law of this country.

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(1) [1920] 2 K. B. 287. (2) [1939] 2 K. B. 678.

I am accordingly of opinion that this appeal should be allowed and that the action brought by the respondent should be dismissed.

In the special circumstances which have been brought to the notice of the House I think that the order of the Court of Appeal so far as it relates to the costs of the appeal to that court should be undisturbed and that the bank should pay the respondent's costs of the appeal to this House.

Lord Normand. My Lords, on the facts stated by my noble and learned friend on the woolsack, the contract of bailment between the parties was a contract between a Czechoslovakian bank and a Czechoslovakian citizen resident in Czechoslovakia. It is said however, that the contract itself, stipulates that the bonds were to be kept for safe custody in London, that the place of re-delivery, the locus solutionis, is the bank's London branch and that it follows that the respondent as present owner of the bonds is entitled to demand and receive them in London without regard to the law of Czechoslovakia, provided that he imposes no uncovenanted burden on the bailee and does not detract from his covenanted reward. The question is whether this proposition is well founded.

I think it well to emphasize that the contract was one between a bank and its customer and that it was for mutual advantage and not for the advantage of the customer alone. Nor was it a contract merely for safe custody. The bonds were English securities bought in London, and the interest on them was collected there. They remained in London, not so much for reasons of safety as because that was the most convenient and business-like arrangement. But the bank did not oblige itself to keep the bonds in London. It informed Mrs. Frankman by letters of March 22 and April 27, 1938, that it held the bonds in London and at its branch there, but it gave no undertaking that it would not remove them from London. It is on the contrary plain from the terms of the form of declaration which accompanied the letter of March 22 that the bank was in its own interest seeking its customer's authority to deposit the bonds " even abroad " at its own discretion. In the same letter the bank enclosed its business conditions. Condition 11 deals only with the costs and risks of the custody. It makes it a condition of the contract that the bank need not transmit the bonds to Prague except by the customer's order and at her expense and risk, and that it will leave them deposited at her expense and risk with " our correspondent, " where they shall be subject to the legal measures of the " respective country." This is a condition conceived in the interests of the bank, and for its protection, and it imposes no obligations on the bank. In two respects there has been some misunderstanding possibly even by the Court of Appeal of the terms of this condition. " Our correspondent " is not to be identified with the bank's branch in London. The correspondent might be another bank in London, and since the condition is part of a form of general application it might happen that the condition applied to a deposit of securities with a foreign bank at a place where the appellant bank had no branch. The other misunderstanding is that it has been supposed that this condition makes the law of the country of the place of deposit the governing law of the contract. But the words " where they shall be subject to the legal " measures of the respective country " warn the customer that the bonds themselves are at the risk of the legislation or administrative action in the country where they are situated and they have no bearing on the law of the contract. Condition 11 therefore does not support the respondent's case.

The respondent next says that condition 50 has no application to contracts of deposit. This contention is without any foundation. The place of the condition in the document of which it is part is among general conditions affecting the bank's business with customers of whatever nature the business may be. It was intended by the bank and must have been understood by the customer, if she read it, to apply to the deposit of the bonds which was the sole subject matter of the letter with which the copy of the conditions was enclosed. The meaning of condition 50 is clear beyond reasonable doubt. The only departments of the bank's establishment which had carried out any transaction with the customer were its branch at Trautenau and the head office in Prague. But the customer had ceased to be a Trautenau customer and had become a Prague customer, so for her the department indicated was plainly the bank in Prague. The words "with the customer" must be taken to have their full significance and I cannot treat them as the equivalent of "on behalf of the customer" as the argument of the respondent requires. The relevant transactions were the transactions by which the shares were acquired and deposited by the bank. Here then is an express stipulation that the place of performance and payment in respect of all obligations under the contract is to be Prague. I do not think that this condition would necessarily have stood in the way of the respondent's receiving physical delivery in London; but it was the bank in Prague which was to make delivery, and it was to that bank that he had to apply for delivery in terms of the condition. The result of this analysis, if it is sound, is that the locus solutionis is Prague and that the contract is from first to last and in all its aspects a Czechoslovakian contract.

From that it follows that the Czechoslovakian law applies and that it is one of the incidents of the contract that it is subject to a municipal law which, as has been held in *Kahler* v. *Midland Bank Ld.* (1), requires that performance by delivery can only be made with the permission of the National Bank of Czechoslovakia. I would therefore allow the appeal.

Lord MacDermott. My Lords, the relationship between the respondent and the appellants is that of bailor and bailee and the right of the former (as personal representative of his mother, Mrs. Paula Frankman) to the return of the debenture bonds, of which he is the owner, necessarily turns on the contract of bailment which was entered into by Mrs. Frankman in the early part of 1938, and the effect thereon, if any, of the relevant Czechoslovakian foreign exchange legislation. The contract was made in Czechoslovakia between a resident Czechoslovakian and a Czechoslovakian bank and I entertain no doubt that, at least so far as its construction

(1) Ante, p. 24.

is concerned, the governing law is Czechoslovakian. On that law there is the evidence of Dr. Otto Kulhanek, though your Lordships are, of course, at liberty to form a view on the accepted translation of the material documents.

The relevant facts and circumstances have already been set forth and I need not repeat them. They raise three questions for determination which I may state thus: (1.) Is it open to the respondent to ignore the appellants' head office in Prague and to have his rights settled as between himself and the appellants' branch office in London where the bonds are? (2.) If not, what is the proper law governing the delivery of the bonds to the respondent? and (3.) Does that law justify the retention of the bonds by the appellants?

As to (1.): The importance of this question lies in the fact that, although the appellants are but a single legal entity, the Czechoslovakian foreign exchange law regards their London branch as an exchange foreigner and their head office as an exchange citizen, the result being that if the respondent, himself an exchange foreigner, is entitled to look to the London branch alone, the delivery of the bonds which he now seeks would not involve any contravention of Czechoslovakian law, and the appellants would not have a good defence to the claim. This question depends, in my opinion, on the true construction of conditions 11 and 50 of the contract. Condition 11 is, I think, only material in so far as it throws light on the meaning of condition 50. In effect condition 11 authorizes the appellants not to bring to their head office securities (such as these bonds) which have not been purchased at the Prague Stock Exchange or received by a Prague bank, save on the order and at the risk and expense of the customer, but to keep such securities deposited elsewhere "where they "shall be subject to the legal measures of the respective "country." There can be no doubt that under this condition, and as Mrs. Frankman did not otherwise order, the appellants were justified in keeping the bonds as they did at their London branch, and it may therefore be said that as regards the duty to *keep* in safe custody the actual place of performance was at that branch. It may also be observed in passing that, though the present case is not concerned with a sub-bailment to some third party, condition 11 contemplates that safe custody may be provided for in that way. The words I have quoted were relied on as showing that the law of the place of deposit was intended to govern the performance of the obligations arising out of the bailment. I cannot accede to this view. In my opinion these words are only a warning that securities kept in another country will, as a matter of course, be subject to any law of that country which may apply to them. I do not think they have any further significance or bearing on the question under discussion.

I come, then, to condition 50 which reads thus: "The "place of performance and payment in respect of all "obligations resulting from the business connexion with us, "shall be considered to be the place of that department of "our establishment which has carried out the relevant "transactions with the customer, except in so far as any other "special stipulation has been made in this connexion." The respondent's first contention was that this stipulation was confined to money transactions and had no relation to deposits for safe custody. In my opinion this contention is ill-founded. When the contract is examined the arrangement of its terms—a matter relied upon by the respondent—does not support the submission, and there is nothing that I can see in condition 50 itself to warrant such a limiting interpretation.

The respondent's second, and principal, contention was that this condition made the appellants' London branch "the place "of performance" and therefore the place where the bonds were to be restored to the possession of the bailor. The "relevant transactions with the customer" were, it was said, the safe-keeping of the bonds, and, as that obligation had been carried out at the London branch, it, the argument proceeded, was the "department of our establishment" referred to in the condition and, so, the place of performance. My Lords, this view accords neither with the evidence of Dr. Kulhanek nor with what seems to me to be the true meaning of condition 50. The London branch, may, in one sense, be said to have kept the bonds *for* Mrs. Frankman, but it did not carry out any relevant transaction *with* that lady. On the proper interpretation of the condition the relevant transaction with her was, in my opinion, the contract of bailment, and the department of the appellants' establishment which carried it out was their head office at Prague and no other. So read, this condition recognizes and declares an established banking practice, namely, that a customer who does business with one branch of a bank cannot, in the absence of some special provision, call as of right upon another branch to complete or clear that business. But read as the respondent would have it, the condition would work a far-reaching departure from that practice and one which it would be strange to find in a series of printed " business conditions " obviously designed for general use. I do not leave out of account the fact that the expression " the place of performance " . . . . of all obligations " is wide and, if read literally, capable of including the safe-keeping in London as authorized by condition 11. In my opinion, however, this consideration does not suffice to displace the construction for which I have already expressed a preference. Condition 50 is, I think, clearly aimed at fixing (in the absence of special stipulation) a particular place of performance and for that reason the word " performance " must, as it appears to me, be taken to connote, in relation to deposits for safe custody, not every act of performance in the due course of the bailment, for that—as condition 11 goes to show—might involve several places, but the act of performance which completes the transaction in question and in which the customer or his nominee participates. So construed condition 50 is not in conflict with condition 11 and can be applied as readily where there is a sub-bailment, or succession of sub-bailments, as where the deposit has been committed to a branch to which the customer is a stranger.

For these reasons I would answer question (1.) in the negative.

Next, as to question (2.). What is the proper law governing the delivery of the bonds ? If the view I take as to the construction of condition 50 is correct, it must follow that the parties to the contract have agreed that Prague is to be considered as the place for delivery up of the bonds. That being their expressed intention I can see no ground for saying that the proper law in this connexion is other than that of Czechoslovakia, and I would answer question (2.) accordingly.

This brings me to question (3.). Does the law of Czechoslovakia justify the appellants in their refusal to hand over the bonds ? On the evidence I think it must be accepted that by the Czechoslovakian foreign exchange legislation in force at all material times the appellants' head office could not lawfully deliver the bonds to their owner without the consent of the Czechoslovakian National Bank, and that such consent has been withheld. That being the position the bailment has not been effectually terminated and the respondent lacks a right to immediate possession. This question must, therefore, be answered in the affirmative. It is an answer that the respondent may not find it easy to appreciate having regard to the course of events since 1938. It seems, however, inescapable so long as the relevant legislation and the attitude of the National Bank remain unaltered; the material terms of the contract still subsist and there is no room for doubt as to the law which they attract.

For these reasons I agree that the appeal should be allowed and the judgment of Cassels J. restored.

LORD REID. My Lords, the respondent is the owner of three 100*l*. debentures of the Skoda Works. He inherited them from his mother, Mrs. Paula Frankman, and it is not disputed that he is the beneficial owner of these securities and that neither the appellants nor anyone else have any interest in them. These securities are at present held in London for the respondent by the appellants who are a Czechoslovakian bank. They are held in the names of nominees of the bank but I do not think that that fact materially affects the issue in this case. In this action the respondent seeks to obtain delivery of these securities and the appellants have refused to deliver or transfer them, the ground of their refusal being that such delivery or transfer would be illegal under the law of Czechoslovakia without the consent of the National Bank of that country, which consent has been refused. This illegality arises under the same foreign exchange law of Czechoslovakia as that which has just been considered by your Lordships in the case of *Kahler* v. *Midland Bank Ld.* (1). I have already expressed my opinion that this law is not one which the English courts are bound to disregard and the same reasoning as that which I have expressed in *Kahler's* case (1) leads to the same conclusion here, that the appellants would commit an offence under the law of Czechoslovakia if they now delivered or transferred these securities to the respondent either in that country or in England. The question for decision in this case is whether the appellants are entitled to rely on that fact as giving them a good defence to this action.

I think that it must be held that the letters of March 22, 1938, and April 27, 1938, and the business conditions therein referred to constituted and defined a contract between the bank and Mrs. Frankman. I leave out of account the declaration referred to because it was never signed. I think that it is clear that the contract made in Prague in 1938 is still in force between the respondent and the appellants as regards the three debentures owned by the respondent and that nothing which has occurred since that date has altered the terms of the contract. The decision of this case must depend on the interpretation of that contract. Two of the business conditions which form part of it are specially important: they are conditions 11 and 50.

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(1) Ante, p. 24.

If the true meaning of the contract is that the only place at which Mrs. Frankman was entitled to demand re-delivery of her securities was Prague, then I think that the appeal must necessarily succeed. If the appellants were to deliver these securities in Prague to the respondent who now represents Mrs. Frankman, they would commit an offence under the law in force there because the consent of the National Bank has not been given. I think that it is now settled law that, whatever be the proper law of the contract, an English court will not require a party to do an act in performance of a contract which would be an offence under the law in force at the place where the act has to be done. But if in the circumstances the respondent has a right to require the securities to be delivered to him in London then it is necessary to go further and inquire whether his right to such delivery must be held to be governed by the law of England or by the law of Czechoslovakia. With these considerations in view I proceed to examine conditions 11 and 50 of the conditions and the letters. I take condition 50 first, because on one view it would be decisive.

It was argued that condition 50 has no application to a deposit of securities for safe keeping because all the clauses which specifically relate to such deposit are grouped near the beginning of the conditions, and condition 50, which is far removed from them, must be intended only to apply to topics dealt with in clauses in its vicinity. I do not think that there is any substance in this argument. Condition 50 is by its terms a general condition and there appear to be other general conditions in its neighbourhood. It occurs near the end of the conditions and that is a natural place to put a clause intended to have general application.

The bank's obligations as bailee of these securities must

I think be held to have "resulted from the business connexion" between it and its customer. That being so, condition 50 stipulates that the place of performance and payment shall be the place of "that department of our establishment which "has carried out the relevant transactions with the customer." It is transactions with the customer that matter, not transactions for the customer. The bank certainly carried out certain transactions for the customer in London, but they carried out no transactions with Mrs. Frankman except through their Prague office. The debentures being held in the name of nominees, the London office did not even know that Mrs. Frankman was their owner. All that the London office ever did was to acquire and hold the securities on instructions from the Prague office. No doubt in ordinary course the London office would also have collected the interest, but again that interest would have been dealt with on instructions from the Prague office. With the greatest respect to the learned judges of the Court of Appeal, I am unable to see how the London office can be said by doing these things to have been carrying out any "transactions with the customer." Condition 50 would therefore apply unless some "other special "stipulation" can be found or unless some qualification of its apparently general meaning is necessary to bring it into line with the rest of the conditions. It was argued that a "special stipulation" can be found in the letters which I have quoted. I do not think so. The letters informed Mrs. Frankman where her securities were being held, but I do not think that they were intended to vary or can be held to have varied the business conditions to which they referred.

The condition which is said to require a qualification of the apparent meaning of condition 50 is condition 11. I think that, assuming that the translation is exact, there is a strong argument that under this condition the bank would not be entitled to move the customer's securities without his consent and this may throw some light on the place where the customer is entitled to demand delivery. A customer dealing with the Prague office would certainly be entitled to demand delivery there if he chose to order transmission of his securities to Prague at his own expense and risk. But could he demand delivery anywhere else? Could he say to the bank: "I want "my securities in London: you are holding them there for "me in your own office. You are not entitled to put me "to the expense and risk of having the securities sent to

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"Prague for delivery to me and then having them sent back "again to London where I want them: your business "conditions were never intended to require such an unbusiness-"like procedure"? That raises a question which I find it unnecessary to decide. I am prepared for the purposes of this case to assume in the respondent's favour that, notwithstanding the terms of condition 50, he may have a right to require delivery of these debentures in London. Then it is said that if that is so, such delivery would not be an offence under Czechoslovakian law. It appears that for the purpose of the Czechoslovakian foreign exchange law foreign branches of Czech undertakings are regarded as separate undertakings, and so the London branch of the appellants' bank is an "exchange foreigner" within the meaning of that law. The respondent is also an "exchange "foreigner" and transactions between exchange foreigners in London are not prohibited. Therefore it is said that delivery to the respondent by the London branch would not be an offence. I think that this argument leaves out of account the fact that the respondent's contract is not with the London branch. The respondent's contract is with the appellants in Czechoslovakia, and the London branch could not deliver in performance of that contract except on instructions from Prague. Such delivery, though in London, would, I think, be delivery by an exchange citizen to an exchange foreigner and as such be prohibited by Czech law. It is therefore necessary to inquire whether the parties' contractual rights with regard to such delivery are governed by the law of Czechoslovakia or by the law of England.

Apart from certain words in condition 11 which I must now consider, I would hold without difficulty that these rights are governed by the law of Czechoslovakia because the proper law of this contract and of every part of it is the law of Czechoslovakia. The contract was made in that country between two parties resident there. It is true that the property with which it was concerned was, at that time, in England, but it was at least in the option of one party to have it moved at any time and to demand re-delivery of the property in Czechoslovakia. The phrase which is said to point to a different conclusion is in the middle of the first paragraph of condition 11 where the bank state that they will leave the securities deposited with their correspondent "where they "shall be subject to the legal measures of the respective "country." As I understand the argument it is that this does not merely mean that "they" (i.e., the securities themselves) shall be subject to the laws of the country where they are deposited: it means that the rights of the parties under the contract with regard to these securities shall also be governed by the law of the country where they are deposited, at least for so long as they remain deposited there. This argument has found favour with the learned judges of the Court of Appeal. As it is at this point that, with the greatest respect, I feel bound to part company with them, I ought to quote their words. Lord Goddard C.J. said (1): "The "shares were left in London and were to be held there according "to the laws of England. It, therefore, seems to me that "condition 11 itself provides what law is to govern the contract "since it says that once the debentures have been deposited, "the law applicable is that of England, not that of Czecho-"slovakia." Asquith L.J. said (2): "This appeal would "seem to turn on the application to the facts of this case "of the rules of English private international law. Their "application seems to me to result in two conclusions, amongst "others: First, that the contract between Mrs. Frankman "and the bank, entered into in 1938, was governed by "Czechoslovak law, the lex loci contractus; but, secondly, "that, if and so far as construed by that law, the contract "provided for obligations to be performed in England, such "obligations were intended to be governed by and should "be treated by English courts as governed by the municipal "law of this country, the lex loci solutionis, and are "accordingly not affected by Czech domestic legislation." I would agree with Lord Goddard that, in one sense at least, securities deposited in London were under condition 11 "to be held [in London] according to the laws of England," but, with respect, I would not agree that it follows that the proper law of the contract, once these debentures are deposited and so far as their deposit is concerned, is the law of England and not the law of Czechoslovakia. I would agree with Asquith L.J. in his first conclusion that the contract was governed by Czechoslovakian law, but I would respectfully disagree with his second conclusion that if and in so far as the contract provided for obligations to be performed in England, such obligations were intended to be governed by the law of England.

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(1) [1949] 1 K. B. 199, 205. (2) Ibid. 206.

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Many if not most of the obligations under the contract were to be performed in Czechoslovakia but, assuming that delivery might be obligatory in certain circumstances in England, some of the obligations of the contract were to be performed in England. I do not think that in such circumstances there is any rule or presumption that those obligations which are to be performed outside the country of the contracting parties shall be construed or governed by the law of the place of their performance. The parties can so agree if they choose, and such an agreement need not be in express terms: it may appear on a proper construction of the contract as a whole. But there must at least be something from which such an agreement can reasonably be inferred. I do not think that it is expressed in or can be inferred from the words of condition 11. Those words are a reminder from the bank to the customer that if the customer chooses to leave his securities lying abroad, his securities will be subject to the hazards of the local law of the place of their deposit. I do not think that in themselves the words of condition 11 mean anything more. Is there then anything in the context to indicate a wider meaning? I cannot find it. In ordinary circumstances one would hardly expect the parties to intend a wider meaning: there is no apparent reason why the parties should find it attractive that rights under the contract with regard to deposited property should vary according to the place where that property might be at the time; and should, so long as that property was deposited abroad, be settled by a law with which the parties were perhaps unfamiliar; but should be settled by the law of their own country as soon as the property was brought back there. In 1938 circumstances in Czechoslovakia were far from ordinary and it may well be that Mrs. Frankman intended that her property deposited outside that country should not be held under a contract which had any relation to the law of that country. But it is not so clear that that would be the intention of a Czechoslovakian bank. I cannot find that any sufficient inference as to the intention of both parties can be drawn from the abnormal circumstances of the time to justify an interpretation being put on the contract which could not otherwise be justified and therefore I must hold that the proper law of the contract—the law of Czechoslovakia—applies throughout, whether the deposited securities remain abroad or are brought back to Prague. If that is so it follows, for the reasons which I have stated in *Kahler* v. *Midland Bank Ld.* (1) and need not repeat, that as re-delivery in present circumstances would be illegal according to the law of Czechoslovakia, and that for a reason which the English courts are not bound to disregard, there is a good defence to this action.

Accordingly I agree that this appeal must be allowed.

LORD RADCLIFFE. My Lords, the issue of this appeal depends on the view that is taken of the contract which Mrs. Paula Frankman made with the appellants in the year 1938. I think that Cassels J. in the High Court took the correct view of that contract. It is only because we are differing from the unanimous view of the Court of Appeal that I add a few words.

In 1938 Mrs. Frankman was a national of Czechoslovakia resident in that country. In March of that year she seems to have transferred her account from the appellants' Trautenau branch to a branch of theirs at Prague, and on March 22 that office wrote to her stating that they credited her with the Skoda Works debentures that are now in question "on "your deposit account with us held in London," and enclosed their business conditions and a declaration concerning the deposit of securities abroad. We must treat her as having accepted the conditions and out of this material we have to ascertain what the contract was.

Certainly condition 11 and condition 50 are important for this purpose. I do not think it necessary to set them out again. No doubt the primary object of condition 11 is to protect the appellants and to make it plain that they are not to be blamed for having left on deposit abroad securities that have been purchased abroad, unless their customer has expressly instructed them otherwise. But it is said that it also results from this condition that if a customer does not so instruct them they are bound to keep the securities where they purchased them: in this case London. I do not think it necessary to decide whether this contention is right or wrong, since even if they had bound themselves to keep the securities in London until otherwise directed I do not think that the proper law of this contract would be any the more English.

Condition 50 is, of course, relied upon by the appellants.

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(1) Ante, p. 24.

I cannot accept the respondent's argument that its position in the list of business conditions renders it inapplicable to contracts of safe custody of securities. I think that it does apply to them as a general condition governing all business relations between the bank and a customer. It is very difficult to escape from the consequence that Prague is the stipulated place for delivery of the securities if the bailment is determined, for Prague and Prague alone is the "place "of that department of our establishment which has carried "out the relevant transactions with the customer." Nor do I find it easy to see how any "special stipulation" to the contrary can be said to have been made. But here again I do not think it essential to determine the point. Even if it were right to suppose that under this contract Mrs. Frankman could demand delivery of her securities in London, since they were in London, it could only be on the authority and with the direction of the Prague branch whose customer she was. The London branch neither had nor was expected to have any direct responsibility to her. Whatever else condition 50 secured, it secured at least this, that, consistently with banking practice, a customer could only resort for the clearance of his business to that branch of the bank with which the business was done. And that is enough to determine this appeal.

I find it impossible to treat this contract, so construed, as anything but a contract the proper law of which is the law of Czechoslovakia. I think it impossible to read the words in condition 11 "where they shall be subject to the laws "of the respective country" as importing that English law was to be the proper law of this contract. These words are no more than a warning, for the protection of the bank, that securities left on deposit abroad will be exposed to the incidence of local legislation. Nor do I think it an admissible construction of condition 50 to treat the London branch of the appellants as the branch "which has carried out the "relevant transaction with the customer." However far one may go in regarding London as the place in which this contract was expected or even was required to be performed, the circumstances of the contract as a whole are such that the law of England cannot be held to displace the law of Czechoslovakia as the proper law of this contract. It is here that I differ from the views of the learned judges of the Court of Appeal. The place of performance is of course an important consideration in determining the proper law of a contract, and if the whole contract is to be performed in one place, as often it is not, that consideration is, I think, that much the more important. But it would be to ignore decided cases of high authority if we were to regard the place of performance as in any sense determining the proper law as a matter of rule, whether it be for the contract as a whole or for one or more parts of the contract.

But if the proper law is the law of Czechoslovakia, we are faced with the same issue as arose in the case of *Kahler* v. *Midland Bank Ld.* (1), and I would make the same answer. It is unnecessary to repeat what I said there. We have in this case the evidence of Dr. Otto Kulhanek, a doctor of law of Prague University. I think that his evidence establishes that the Czechoslovakian currency regulations do draw a distinction between the appellants' Prague office and its London branch. The legal entity remains the same but the appellants as the London branch, being exchange foreigners, may effect transactions which would be forbidden to them when acting as their Prague office and as such exchange citizens. He was, however, explicit that under these regulations a release to the respondent, even if the operation were consummated by physical delivery in London, would be regarded as a transfer between an exchange citizen and an exchange foreigner, because Mrs. Frankman was the customer of the Prague office, not the London branch, and the release would accordingly be forbidden unless the prior consent of the National Bank of Czechoslovakia had been obtained. The physical situation of the bonds he regarded as irrelevant for this purpose. I think that we ought to accept his interpretation of the law on this point, and it seems to me to present a reasonable view of the scope of the regulatory system. The London branch of the appellants may deal with its customers, if they are exchange foreigners, without the Czechoslovakian regulations seeking to control the appellants; but the Prague office may not deal with its own customers through the hands of the London branch except under the control of the National Bank.

In the result I think that we ought to come to the conclusion that the contract of safe deposit between Mrs. Frankman and the appellants, to the benefit and obligations of which the respondent has succeeded, cannot be treated as terminable

(1) Ante, p. 24.

at the will of the bailor. It must be treated as terminable only with the consent of the National Bank, and that consent is not forthcoming. If the contract that governs the bailment is not presently terminable, it is impossible to allow the respondent to ignore the contract and to sue the appellants in rem for the recovery of what is indisputably his property.

Appeal allowed.

Solicitors for appellant: *Freshfields.*

Solicitors for respondent: *W. R. Bennett & Co., for Barrow-Sicree & Co., Manchester.*

J. C.*

1949

Nov. 2.

[PRIVY COUNCIL]

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . . . APPELLANT;

AND

ESQUIMALT AND NANAIMO RAILWAY COMPANY AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA

Canada—British Columbia—Railway—Construction scheme—Grant of lands—Tax exemption under provincial statute—No contractual relationship between province and railway contractors or railway company—Proposed taxation—Direct land tax—Within provincial legislative competence—Forest protection impost—A "tax" within the exemption provision—Island Railway, Graving Dock and Railway Lands Act, St. B. C., 1884, *c.* 14, *ss.* 8, 22*—Forest Act, R. S. B. C.* 1936, *c.* 102, *s.* 124.

An agreed scheme entered into in 1883 by the Government of British Columbia, the Dominion Government and a group of financiers (the contractors), in connexion with the construction of a railway on Vancouver Island involved, as finally put into operation, that a belt of land on the island through which the railway was to run, belonging to the Crown in right of the province (known as the "island railway belt") was to be vested in the Crown in right of the Dominion, that a company was to be incorporated for the purpose of constructing and operating the

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**Present*. VISCOUNT SIMON, LORD GREENE, LORD OAKSEY, LORD MORTON OF HENRYTON, and RINFRET C.J. of Canada.

railway, and that the island railway belt was to be transferred to it by the Dominion as soon as the construction was satisfactorily completed. In addition the company was to receive from the Dominion a sum in cash by way of further subsidy. To carry the scheme into effect there came into existence, inter alia, first, the Settlement Act of 1883, passed by the provincial legislature, which, after providing in s. 8 for the incorporation of the company, enacted in s. 22 that " The lands to be acquired by the company " from the Dominion Government for the construction of the " railway shall not be subject to taxation, unless and until the " same are used by the company for other than railroad purposes, " or leased, occupied, sold, or alienated " ; secondly, a contract, dated August 20, 1883, between the contractors and the Dominion Government for the construction of the railway, under which, inter alia, the island railway belt was to be granted subject in every respect to the provisions of the Settlement Act ; and thirdly, a conveyance, dated April 21, 1887, of the island railway belt by the Dominion to the railway company on completion of the railway, subject, among other things, to the Settlement Act.

The belt of land thus acquired by the railway company comprised valuable timber land. In 1945 a Commissioner who had been appointed to inquire into the forest resources of the province pointed out in his report that the province was receiving no revenue from timber cut on the island railway belt, and he discussed the possibility of imposing (1.) a " severance tax " on such timber cut from such of the land as was sold by the railway company, and (2.) a " fire protection tax " on unalienated land, and in answer to a contention by the railway company that to impose the " severance tax " would be a " breach of the contract between " the province and the railway company " he was of opinion, inter alia, that there was no contract between them. Thereafter, and consequent on the raising of those matters by the Commissioner, a number of questions were referred for the opinion of the court.

Held, first, that there was no contractual relationship between the province and the contractors or the railway company. There was no agreement in contractual form between the province and the contractors and such an agreement could not be inferred from the documents and the acts of the parties. Still less was there a contractual right in the contractors of such a nature as would give them in law a right to complain of breach of contract if legislation diminishing or taking away the tax exemption conferred by s. 22 were to be passed at a later date. As no such contractual relationship as was suggested ever came into existence as between the province and the contractors, it followed that no such relationship could be claimed by the railway company to exist for its benefit by reason of its succession to the rights of the contractors.

Held, secondly, that it was within the competence of the provincial legislature to enact a statute for the imposition of a tax on land of the island railway belt containing provisions substantially as follows : " (*a*) The tax shall apply only to land

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"in the belt when used by the railway company for other than "railroad purposes, or when leased, occupied, sold, or alienated; "(*b*) when land in the belt is used by the railway company for "other than railroad purposes, or when it is leased, occupied, sold, "or alienated, it shall thereupon be assessed at its fair market "value; (*c*) the owner of such land shall be taxed on the land "in a percentage of the assessed value, and the tax shall be a charge "on the land." Even assuming that the timber lands in the belt had no substantial value beyond the value of the timber, the tax proposed was in reality a tax on land and not, as contended by the respondents, a tax on timber, and it was a direct tax.

Atlantic Smoke Shops v. *Conlon* [1943] A. C. 550, 565 referred to.

Held, thirdly, that the impost for forest protection charged by s. 124 of the Forest Act, R. S. B. C. 1936, c. 102, which provides that from the owners of timber land "there shall be payable "and paid to the Crown . . . . an annual tax at the rate of "six cents for each acre," was a tax within the ordinary significance of that word, and not, as contended by the appellants, a "service "charge." The tax derogated from the provisions of s. 22 of the Settlement Act, and accordingly the railway company was exempt from payment thereof.

Judgment of the Supreme Court of Canada [1948] S. C. R. 403, affirmed in part and reversed in part.

APPEAL (No. 7 of 1949), by special leave, from a judgment of the Supreme Court of Canada (June 25, 1948) allowing an appeal by the respondents and dismissing a cross-appeal by the appellant from a judgment of the Court of Appeal for British Columbia (June 10, 1947), which had answered seven questions referred to it by an order of the Lieutenant-Governor in Council under the authority of the Constitutional Questions Determination Act, R. S. B. C. 1936, c. 50.

The following facts, and the questions referred, are taken from the judgment of the Judicial Committee: The events leading up to the present controversy were so fully and clearly stated in the judgments of the Canadian courts (1) that not more than a brief outline of them need be given. In the year 1883 an outstanding question between the province of British Columbia and the Dominion of Canada with regard to the construction of a railway on Vancouver Island, originally contemplated as part of the C.P.R. trans-continental route, was finally put to rest by means of an agreed scheme. Three parties were involved in that—the provincial government, the Dominion government, and a group of financiers (called "the contractors") who were prepared to arrange for the

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(1) [1948] S. C. R. 403.

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construction of the railway. The scheme as it was finally put into operation involved the following main steps. A belt of land on the island through which the railway was to run, belonging to the Crown in right of the province (known as the "island railway belt") was to be vested in the Crown in right of the Dominion. A company was to be incorporated for the purpose of constructing and operating the railway, and the island railway belt was to be transferred to it by the Dominion as soon as the construction was satisfactorily completed. In addition, the company was to receive from the Dominion a sum of cash by way of further subsidy. For the purpose of carrying the scheme into effect a number of what, for convenience, might be called "constituent documents" came into existence. They were shortly as follows :—

(1.) The draft of a bill to be introduced into the provincial legislature the form of which was finally signed as agreed by representatives of the provincial and Dominion governments under date August 21, 1883, and was endorsed by Robert Dunsmuir, the leader of the group of contractors, with their acquiescence in its terms on August 22, 1883. The draft bill recited an agreement between the province and the Dominion for the purpose of settling existing disputes between them. It was passed by the provincial legislature and assented to on December 19, 1883. It was known as the "Settlement Act." Sections 8 and 22 provided as follows :

"8. For the purpose of facilitating the construction "of the railway between Esquimalt and Nanaimo, it is "hereby enacted that such persons, hereinafter called "'the company,' as may be named by the Governor-"General in Council, with all such other persons and "corporations as shall become shareholders in the company, "shall be and are hereby constituted a body cor-"porate and politic by the name of 'The Esquimalt "'and Nanaimo Railway Company.'"

"22. The lands to be acquired by the company from "the Dominion government for the construction of the "railway shall not be subject to taxation, unless and "until the same are used by the company for other than "railroad purposes, or leased, occupied, sold, or alienated."

(2.) A contract between the contractors and the Dominion government dated August 20, 1883, for the construction of the railway. By cl. 13 of that contract the government agreed to grant to the contractors by way of subsidy the cash and belt of land above-mentioned. By cl. 15 the land was to be granted subject in every respect to the provisions of the Settlement Act (then in the form of the draft bill).

(3.) A Dominion Act (assented to on April 19, 1884) which recited the above-mentioned agreement between the province and the Dominion and also the passing of the Settlement Act by the provincial legislature.

(4.) Nomination (made by Dominion Order-in-Council on April 12, and gazetted on April 19, 1884) of the persons to be incorporated as provided by s. 8 of the Settlement Act whereby the railway company was brought into existence as a corporate entity.

(5.) Conveyance, dated April 21, 1887, of the island railway belt by the Dominion to the railway company on completion of the railway, subject, among other things, to the Dominion Act (No. 3 above) and the Settlement Act.

In addition to those constituent documents reference was made on behalf of the parties to a large number of documents, correspondence, Orders-in-Council, reports, etc. The Board had carefully considered them, but as in their opinion they lent no effective support to the case presented on behalf of the respondents they made no further reference to them.

The belt of land thus acquired by the railway company comprised valuable timber land and formed an important subsidy. Granted as it was, it was not subject to the payment of any royalty such as was ordinarily payable (subsequently, at any rate, to the year 1887) under Crown leases and licences relating to timber lands. Moreover, the tax exemption granted by s. 22 of the Settlement Act, so long as the conditions there mentioned continued to exist and so long as the section should remain in force, constituted a privilege of considerable value to the railway company. Among the taxes comprised in the exemption was the provincial land tax which was imposed on land in the province, including timber land.

On December 31, 1943, Sloan J., afterwards Chief Justice of the province, was appointed by the Lieutenant-Governor as Commissioner to inquire into a number of matters relating to the forest resources of the province. In 1945 the Commissioner issued his report which, among other things, dealt with the island railway belt. He pointed out that the province was receiving no revenue from the timber cut on those lands and discussed the possibility of imposing: (1.) a "severance "tax" on such timber cut from such of the land as was sold by the railway company; (2.) a "fire protection tax" on unalienated land. In relation to a "severance tax" he referred to certain considerations which had been placed before him on behalf of the railway company in the following terms: "(Page 179.) There never was any contractual relationship "between the provincial government and the contractors or "the railway company in relation to the transfer of the railway "belt to the railway company. (Page 183.) It has been "said that to impose such a tax would be a 'breach of the "'contract between the province and the railway company.' "There are two obvious answers to that argument. In the "first place there is no contract between the province and the "company. If, on the other hand, the Acts of 1883-84 are "assumed to create such a relationship, then the terms of "s. 22 must govern. That section, it will be recalled, only "exempted the railway lands from taxation 'until the same "'are used for other than railroad purposes, or leased, occupied, "'sold or alienated.'" The tax contemplated by the Commissioner was not to go outside that.

Consequent on the raising of those matters by the Commissioner in his report a reference was made to the Court of Appeal of the province under the relevant provincial statute. It submitted seven questions. All of them, except question 4, were answered by the majority of the Court of Appeal (O'Halloran, Sidney Smith and Bird JJ.A.) favourably to the submission made on behalf of the province. On appeal to the Supreme Court of Canada (Kerwin, Rand, Kellock, Estey and Locke JJ.) all were answered adversely to those submissions, and the Attorney-General for the province now appealed. The appeal was resisted by the railway company, Alpine Timber Co. Ld. (a past purchaser of land from the railway company) and the Attorney-General for Canada.

The seven questions fell under three heads. The first three raised, and involved in different forms, the question of an alleged contract between the province and the contractors or the railway company and the effect of such alleged contract in relation to different forms of proposed taxation having regard particularly to s. 22 of the Settlement Act. Questions 4, 5 and 6 were not concerned with the alleged contract, but raised the question whether the forms of taxation therein proposed were intra vires the provincial legislature. Question 7 raised a separate question which did not fall within either of those two heads.

The questions referred were as follows:

(1.) " Was the said Commissioner right in his finding " that ' there never was any contractual relationship between " ' the provincial government and the contractors or the " ' railway company in relation to the transfer of the railway " ' belt to the railway company ' ? "

(2.) " If there was a contract, would any of the legislation " herein outlined, if enacted, be a derogation from the " provisions of the contract ? "

(3.) " Was the said Commissioner right in his finding " that ' There is no contract between the province and the " ' company,' which would be breached by the imposition " of the tax recommended by the Commissioner ? "

(4.) " Would a tax imposed by the province on timber " as and when cut upon lands in the island railway belt, " the ownership of which is vested in a private individual " or corporation, the tax being a fixed sum per thousand " feet board measure in the timber cut, be ultra vires of the " province ? "

(5.) " Is it within the competence of the legislature of " British Columbia to enact a statute for the imposition of " a tax on land of the island railway belt acquired in 1887 " by the Esquimalt and Nanaimo Railway Company from " Canada and containing provisions substantially as follows :

" (*a*) When land in the belt is used by the railway " company for other than railroad purposes, or when it " is leased, occupied, sold or alienated, the owner thereof " shall thereupon be taxed upon such land as and when " merchantable timber is cut and severed from the land :

" (*b*) The tax shall approximate the prevailing rates of " royalty per thousand feet of merchantable timber :

" (*c*) The owner shall be liable for payment of the tax :

" (*d*) The tax until paid shall be a charge on the land ? "

(6.) " Is it within the competence of the legislature of " British Columbia to enact a statute for the imposition " of a tax on land of the island railway belt acquired in 1887 " by the Esquimalt and Nanaimo Railway Company from " Canada and containing provisions substantially as follows :

" (*a*) The tax shall apply only to land in the belt when "used by the railway company for other than railroad "purposes, or when leased, occupied, sold, or alienated :

"(b) When land in the belt is used by the railway "company for other than railroad purposes, or when it is "leased, occupied, sold, or alienated, it shall thereupon "be assessed at its fair market value :

"(c) The owner of such land shall be taxed on the land "in a percentage of the assessed value, and the tax shall "be a charge on the land :

"(d) The time for payment of the tax shall be fixed "as follows :

"(i) Within a specified limited time after the assessment, with a discount if paid within the specified "time ;

"(ii) Or at the election of the taxpayer made within "a specified time after assessment, by paying each year "on account of the tax a sum that bears the same ratio "to the total tax as the value of the trees cut during "that year bears to the assessed value of the land."

(7.) "Is the Esquimalt and Nanaimo Railway liable to "the tax (so-called) for forest protection imposed by s. 123 "of the 'Forest Act,' being chapter 102 of the 'Revised "'Statutes of British Columbia, 1936,' in connexion with "its timber lands in the island railway belt acquired from "Canada in 1887 ? In particular does the said tax (so-"called) derogate from the provisions of s. 22 of the afore-"said Act of 1883 ?"

1949. June 27, 28, 29, 30 ; July 4, 5, 6, 7, 11, 12 and 13. *J. W. de B. Farris K.C.*, *John L. Farris* and *H. Alan Maclean* (all of the Canadian Bar) for the appellant, the Attorney-General for British Columbia. On the first question—whether there was a contract between the province and the contractors or the railway company—there was neither an offer nor an acceptance here, which both depend on intent. The province was dealing in a contractual manner with the Dominion, and at the instigation of the latter, on a high level of the two governments, each having plenary powers within its jurisdiction, and therefore there was no intent to deal with the company except in regard to certain details which are set out in the Act. The contractors, or the company as their successors, made their contract exclusively with the Dominion. In a petition in 1904 by the railway company to the Governor-

General in Council for the disallowance of an Act known as the "Vancouver Island Settlers' Rights Act, 1904," it was stated that "the Esquimalt and Nanaimo Railway Company "do not recognize the right of the provincial legis- "lature to interfere with the land grant, as the company "did not receive the land from the provincial government, "nor did they enter into any contract with the provincial "government." No more authoritative statement could be made than that. [Reference was made to *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (1).] Section 3 of the Settlement Act, 1883, grants the land to the Dominion "in trust to be appropriated as they may deem "advisable." The Dominion, however, are not trustees for the contractors. If such a trust were to be set up there would have to be a real tripartite agreement between the parties. The contract of the Dominion with the contractors negatives a trust. The Settlement Act was not open to the construction that the Dominion was a trustee for a corporation which had not yet been created: *Burrard Power Co., Ld.* v. *The King* (2); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (3). The agreement of August 20, 1883, between the contractors and the Dominion negatives the suggestion that the Dominion was holding these lands in trust for the contractors or their successors. It is a straight contracting in consideration of certain things to be done. Again, in the Dominion Act of 1884, which recited the above agreement, there is no suggestion that these lands were being held as trust lands by the company. The recitals of the Settlement Act are also against any inference of trust.

If there is no contract between the province and the contractors, the second question does not arise. If it is held that there was a contract, question two becomes material, and should, it is submitted, have been answered in the negative, first, because the tax proposed is not inconsistent with the terms of s. 22 of the Settlement Act, and secondly, because the railway company has for some years used the lands for other than railroad purposes. As stated by O'Halloran J.A., "the "railway company assumed title to these lands on the terms "set out in s. 22 and cannot now complain of the basis on which "its title rests." Further, s. 22 of the Settlement Act and s. 7 of the Interpretation Act, 1877, must be read together in the sense that one necessarily qualifies the other, and any interference with s. 22, if done in the public interest, must be presumed to be good. Question (3) at first sight appears to overlap question (1), but it has relation to a different subject-matter : it was intended only to be directed to the Esquimalt and Nanaimo Railway Company's Land Grant Tax Exemption Ratification Act, 1912, of British Columbia. The provisions of that Act, however, did not in intent or result indicate or create any contractual obligations between the company and the province changing the operative effect of s. 22 or adding thereto any new obligations, and question (3) should be answered in the affirmative. The tax that should stand or fall is in question (6)—the appellant is not so much concerned with questions (4) and (5), and it is proposed to argue question (6) detached from any association with them. Question (6) should have been answered in the affirmative because the tax proposed is a land tax and as such is a direct tax within the competence of the province. Sub-head (*c*) of question (6) is a clear announcement that the owner of the land shall be taxed. If this is a land tax that is an end of the matter. The tax is valid within the decisions of this Board in *City of Montreal* v. *Attorney-General for Canada* (1) and *City of Halifax* v. *Fairbanks' Estate* (2). *Forbes* v. *Attorney-General for Manitoba* (3) is a direct confirmation of the principle laid down in the *Fairbanks'* case (2) that, if the tax falls within one of the well-known categories which in themselves determine whether a tax is direct or indirect, that is an end of the matter. In *Atlantic Smoke Shops, Ld.* v. *Conlon* (4) it was said that " it " has been long and firmly established that, in interpreting " the phrase ' direct taxation ' in head 2 of s. 92 of the Act " of 1867, the guide to be followed is that provided by the " distinction between direct and indirect taxes which is to be " found in the treatise of John Stuart Mill," where it was said that a direct tax is one which is demanded from the very persons who it is intended or desired should pay it, while indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. The *Fairbanks'* case (2), confirmed by the *Forbes* case (3), together with the *Montreal* case (1) is authority for the proposition that if a tax is a tax on the land that is the end of it, and it falls within the well-

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(1) [1930] A. C. 357.

(2) [1911] A. C. 87, 94.

(3) (1889) 14 App. Cas. 295, 299.

(1) [1923] A. C. 136, 142.
(2) [1928] A. C. 117, 122.
(3) [1937] A. C. 260, 268.
(4) [1943] A. C. 550, 563.

known classification. The Supreme Court said that this was an indirect tax, and secondly, that it is a colourable tax. The wording of the Act itself is contrary to that. The inference drawn by the Supreme Court as to the purpose of the tax is incorrect. The nature of the tax as a land tax is not changed because the value of the land is largely determined by the value of the standing timber. The principles established by the Supreme Court in *Reference as to the Validity of* s. 31 *of the Municipal District Act Amendment Act*, 1941, *Alberta Statute*, c. 53, *and as to the Operation thereof* (1) and in *Home Oil Distributors, Ld.* v. *Attorney-General for British Columbia* (2) support the submission for the appellant here. The last-cited case, though not directly in point, assists on "colour-"ability." There is no justification for the suggestion that the proposed tax is colourable. The only intent to be inferred from the proposed legislation is the desire of the government of the province to impose a direct tax on the lands in question for the raising of revenue for provincial purposes.

John L. Farris followed. With regard to question (7), it is submitted, first, that the contributions exacted under s. 124 of the Forest Act are not taxes, but are simply service charges for special services, and secondly, that, even assuming that they are taxes, they are not taxation within the meaning of s. 22 of the Settlement Act. The Forest Act is not a taxing statute. The present case is a little stronger than the English War Damage Act, 1941, because under that Act the sums go to the Exchequer, into the consolidated revenue fund, whereas under the Forest Act they go into a special forest protection fund which is maintained at a certain level. It is not a tax at all, but is a service charge for the protection which the province gives to the owners of timber. In *Shannon* v. *Lower Mainland Dairy Products Board* (3) the Board held that the fees there in question were supported as charges for services rendered. [Reference was also made to *In re Constitutional Questions Determination Act and In re Natural Products Marketing (British Columbia) Act* (4).] A service charge differs from a tax in that it is assessed only on those who are receiving the services, and moneys so obtained are used primarily for the special benefit of those who have been charged, whereas a tax is paid to the State primarily for public purposes. The cases relied on in the court below by the respondents are, it is submitted, distinguishable: *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1); *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (2) —there is a great distinction between the adjustment levy in that case and the contribution in the present case; there was no suggestion in that case of any service being rendered in return for it; *Morris Leventhal* v. *David Jones Ld.* (3) illustrates the difference between a tax for a specific public purpose and a charge for a special service. *City of Halifax* v. *Nova Scotia Car Works Ld.* (4) was again a case where the tax was for the general benefit of the public as a whole, and therein lies the distinction. This contribution is not a burden in the sense in which ordinary taxation is a burden, because full value is given and to the contributors alone. The object of the Act must be taken into consideration, and here the object is to relieve the railway company from a burden: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (5).

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(1) [1943] S. C. R. 295, 298.

(2) [1940] S. C. R. 444, 448, 451–2.

(3) [1938] A. C. 708, 720–1.

(4) [1937] 52 B. C. R. 179, 192.

C. F. H. Carson K.C. (Canadian Bar), *Gahan*, and *Allan Findlay* (Canadian Bar) for the respondent the Esquimalt and Nanaimo Railway Co. It is not contended that there was a formal contract between the railway company and the provincial legislature, or that the subject-matter of any contract was existing legislation, that is, s. 22 or other sections of the Settlement Act. What is contended is, broadly, that there was a business arrangement between the provincial government, that is, the executive, or the province in right of the King, the Dominion government, that is, the executive, or the Dominion in right of the King, and the builders of the railway pursuant to which the railway company was to build and maintain and work in perpetuity both the railway and the telegraph line, in consideration of which the railway company was to receive from the Dominion $750,000 and was to receive from the province a grant of tax-free lands. In those circumstances there was a contractual relationship between the provincial government and the contractors, one term of which was that the province was to make a grant of tax-free lands. That required provincial legislation and in fulfilment of its obligation to that end the provincial government introduced

(1) [1931] S. C. R. 357, 362–4.
(2) [1933] A. C. 168, 174–5.
(3) [1930] A. C. 259, 269.
(4) [1914] A. C. 992, 997.
(5) [1924] A. C. 222, 242.

and passed the Settlement Act which contained s. 22 granting immunity from taxation to the agreed extent. The suggestion put against the respondents is that no legislature can bind future legislatures. If there is such a contractual relationship, however, the government whom the appellant represents on this appeal does not propose to do anything in violation of it. The Supreme Court held that there was no contractual relationship with the contractors, but that there was with the railway company; in any event the position of the contractors was temporary only, and ceases to be of any practical importance except so far as it has any bearing on the position of the railway company, for the only point is whether there is any contractual relationship continuing to the present time with the railway company. Abundant evidence establishing such contractual relationship is to be found in the legislation, the documents, the acts of the parties and the circumstances under which the railway was constructed. Each of the three agreeing parties to the construction of the railway had assumed definite obligations. First, the Dominion was to contribute $750,000, hold the provincial lands in trust, and take security for the construction of the railway. Secondly, the contractors were to put up $250,000 as security, and when incorporated as the railway company were to build the railway and the telegraph line and to maintain and work them continuously. Thirdly, the province was to furnish a minimum of 1,900,000 acres of land, was to incorporate the railway company, and further, the lands granted for the railway were to be free from taxation —in the terms of s. 22 of the Act of 1883. When the Act is examined it is found that the railway company shall do certain things, and the implication is that there has been a pre-existing agreement; it is evidence of such an agreement, so that there is a contractual relationship, and it follows that the tax exemption is part of that relationship. The contractual relationship between the province and the railway was part of the tripartite agreement, and there was consideration involving mutual promises. All the obligations of the province are plainly expressed in written words, and so are those of the railway company; the only thing that is not expressed in writing is that we, the province, and we, the railway company, contract an agreement as follows. It should be implied, however, from the evidence that when the province and the railway company each entered, for the benefit of the other, into precisely defined obligations, they did so in agreement with each other and in consideration of what the other was doing so as to meet their agreement and contractual obligations—and that applies to the tax exemption provision.

The Dominion assumed the role of agent of the province to construct the railway. It was not content as between itself and the province to assume the role of principal either in constructing or securing the construction of the railway for the province. The provincial government are in every way the real principals. It is consistent with the view that the Dominion was agent for this purpose that the land grant should be made to the Dominion in the first instance to be held in trust and to be turned over to the railway company on completion of the work. With regard to the trust, one must read the whole Act, and it is clear that the Dominion was to receive the legal title to the lands, but was expressly excluded from the beneficial ownership, because that was to vest in the cestui que trust. The fact that the province created the Dominion trustee of the lands is some evidence of this contractual basis. [Reference was made to *Canadian Pacific Ry. Co.* v. *The King* (1).] Clause 15 of the construction contract of August 20, 1883, relating to the grant of land, was inserted with the knowledge and authority of the province, and was a promise made by the province through its agent, the Dominion, and if that is so, it follows that the province contracted with the contractors in relation to the transfer of the railway belt to the railway company, and the province was the real principal. Lastly, *Dominion Building Corporation* v. *The King* (2) is an illustration of the Crown being held liable in respect of a contract that required legislative action over a period of years. [Reference was also made to *Attorney-General for Canada* v. *Attorney-General for Ontario* (3).]

Assuming that question (1) is answered in favour of the respondents, it is submitted on question (2) that the effect of the proposed legislation would be (*a*) substantially to reduce the value of this respondent's timber lands; (*b*) to take away a material part of the consideration for which this respondent entered into the contract with the province; and (*c*) to tax the timber lands of the company in contravention of the tax exemption. This tax would be over and above the tax to which all Crown timber lands are subject under the taxation of British Columbia. While the proposed tax would normally

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(1) [1931] A. C. 414, 428.
(2) [1933] A. C. 533, 540, 544.
(3) [1937] A. C. 326, 347.

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be imposed on, and paid by, the purchaser from the railway company, the tax would in fact be borne by the railway company in the sale of its timber lands, with the result that the province would have deprived the company of a large part of the consideration received for constructing the railway. In effect it would not be materially different from confiscation without compensation. The enactment of the tax, although not due for payment until the lands are sold, operates immediately to reduce their value in the hands of the railway company. There could be no complaint of the tax, operating as it does only after sale, if it were imposed on all timber lands in the province. The complaint is that because no other lands were so taxed our timber lands were deprived of more than half their value. That constitutes a derogaton from our contract. On the true construction of s. 22 taxation does not mean a discriminatory tax on the railway lands, and this discriminatory taxation would be a derogation from the contract and from the grant. [Reference was made to *Burrard Power Co., Ld.* v. *The King* (1).]

As to question (3), there are two contracts which would be breached by the imposition of the tax, first, the one under question (1), and even if that be wrong, then the 1912 contract entered into between the province and this respondent when its railway was leased to the Canadian Pacific Railway Company would be breached. If I am right either on question (1) or on the 1912 contract, then question (3) must be answered in my favour.

It was stated for the appellant that if he got a favourable answer on question (6) he was not concerned with questions (4) and (5). While the latter is on its face a tax on land, it is really a timber tax. Turning to question (6), an attempt has been made to relate the tax to the assessed value of the land and thereby to give it the appearance of a land tax. [Reference was made to *Attorney-General for Ontario* v. *Reciprocal Insurers* (2) and *Attorney-General for Alberta* v. *Attorney-General for Canada* (3).] The proposed legislation, while purporting to impose a tax on the land, would in effect impose a tax on the timber. From an examination of the effect of the legislation outlined in question (6) it would appear that the tax is substantially the same as the taxes proposed by questions (4) and (5)—the contents in the bottle are the same, the label has been changed. The tax bears no relation to the land value. If it is right that the tax in question (6) when demanded from the purchaser is a timber tax, it would equally be so when demanded from the railway company. No sane business man would elect to pay under option (*d*) (i) with all the risks of fire, pests, etc., and question (6) should be considered as though that option is not there. Next, the tax would not be demanded from the person who it is intended or desired should pay it, but would be demanded from one person in the expectation and intention that he should indemnify himself at the expense of another. Such taxation would not be direct taxation within the meaning of s. 92 (2) of the British North America Act: *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1); *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (2); *Caledonian Collieries* v. *The King* (3); *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (4); *City of Charlottetown* v. *Foundation Maritime, Ld.* (5); *Forbes* v. *Attorney-General for Manitoba* (6) and *Reference re the Validity of s.* 31 *of the Municipal District Act Amendment Act*, 1941 (7). It was said for the appellant that if this is a land tax that is an end of the matter; that " if " is a big one in this case. This particular tax has not followed the general tendency: Mill's formula was not relevant to a tax which was passed back. Locke J. in the Supreme Court sums up the way we put it: " It appears to me " to be perfectly clear that this tax would not be borne by the " person who would pay it, since he would by the reduction " in the purchase price have indemnified himself either wholly " or in part at the expense of the railway company if he bought " from them directly."

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(1) [1911] A. C. 87, 94.

(2) [1924] A. C. 328, 337.

(3) [1939] A. C. 117, 130.

As to question (7), the levy provided by s. 124 of the Forest Act is a tax, and this respondent, by virtue of s. 22 of the Settlement Act, is not liable to taxation in respect of the lands referred to in the question.

D. N. Hossie K.C. (Canadian Bar) and *J. G. le Quesne* for the respondent the Alpine Timber Co. Ld. Our interest in this appeal is that we are purchasers from the railway company from time to time of considerable quantities of these very timber lands, and are the persons on, and from whom, in the first instance the province proposes to levy and collect this tax. We rely on and adopt the argument of counsel for the railway company. On question (1), whether there was a contract between the province and the contractors or the railway company, an alternative submission is that a contract between the province and the railway company is to be found in two documents, first, that part of the Settlement Act which deals with the railway company, ss. 8 to 28 inclusive, and secondly, the Order in Council of 1884 passed by the Dominion naming the incorporators of the company. Those two documents taken together regulate the contractual relationship between the railway company and the province qua the railway lands, and make up evidence of the contract. [Reference was made to *Davies* v. *Rhondda District Urban Council* (1), and *Sutton* v. *Attorney-General* (2).] The conduct of the parties since April 19, 1884 (the date of the Dominion Act) was entirely consistent with the existence of a contract between the province and the railway company, and in fact was inconsistent with the opposite suggestion. In other words, the province has done exactly what it would be expected to do if s. 22 were a term of the contract between the railway company and the province. The company has been allowed for this period of 60 years to build more railways, spend more money and open up more lands, all consistent with the contract, and the province has not exacted any other terms from them, but has accepted that position. [Reference was made to *Commercial Cable Co.* v. *Government of Newfoundland* (3).] As to question (2), the proposed legislation would reduce the value of the lands to the railway company. We being in the position of prospective purchasers of timber lands, the position is just the same as if we were offered lands by the railway company which were subject to an encumbrance. All I have said on question (1) applies equally to question (3). The taxes which are suggested in questions (5) and (6) are really nothing more than question (4) in a different form. They are all timber taxes. Cases which have not been cited are *Board of Trustees of Lethbridge Irrigation District* v. *Independant Order of Foresters and Attorney-General for Canada* (4), *Attorney-General for Quebec* v. *Queen Insurance Co.* (5) and *Lower*

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(1) [1925] A. C. 561, 566, 568.

(2) [1927] A. C. 934, 936.

(3) [1927] S. C. R. 257; [1928] A. C. 358, 362.

(4) [1930] A. C. 357, 363.

(5) [1932] S. C. R. 589.

(6) [1937] A. C. 260, 268.

(7) [1943] S. C. R. 295.

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(1) (1918) 87 L. J. (K. B.) 166, 169.

(2) (1923) 39 T. L. R. 294, 296–9.

(3) [1916] 2 A. C. 610, 614.

(4) [1940] A. C. 513, 529, 533.

(5) (1878) 3 App. Cas. 1090, 1099.

Mainland Dairy Products Board v. *Turner's Dairy Ld.* (1). The discriminatory nature of the tax is in itself an element to be considered in determining what the tax really is and what the legislature is really doing. The fact that the tax is imposed only on railway lands indicates that it is intended to hit the railway company and not the purchaser of the land: *Forbes* v. *Attorney-General for Manitoba* (2); *City of Halifax* v. *Fairbanks' Estate* (3); *City of Montreal* v. *Attorney-General for Canada* (4) and *Reference as to the Validity of s.* 31 *of the Municipal District Amendment Act,* 1941 (5). Here there is a special rate, which is not levied for ordinary purposes, and which exceeds the ordinary local rates and goes to 55 per cent. The tax is clearly a "new and unfamiliar tax" in its very nature: the *Fairbanks'* case (3). It was said in *Atlantic Smoke Shops* v. *Conlon* (6) that "it would be more accurate "to say that a sales tax is indirect when in the normal course "it can be passed on," and that the *Fairbanks'* case (3) should "not be understood as relieving the courts from the obligation "of examining the real nature and effect of the particular "tax . . . . or as justifying the classification of the tax as "indirect merely because it is in some sense associated with "the purchase of an article." The tax proposed in question (6) is nothing more than a royalty measured by the timber which is on the land. Any discount which would be offered could not in the nature of things be commensurate with the risk which the operator has to take: it is impossible to compute the results of fire, insects, disease, blow-down, etc.

B. MacKenna, and W. *R. Jackett* (Canadian Bar) for the respondent the Attorney-General for Canada. The Dominion is interested in the outcome of this appeal for two reasons. First, it is concerned that an unduly wide interpretation should not be given to the provincial power to make laws in respect of direct taxation, and for that reason wishes to uphold the answers given in the Supreme Court to questions (4), (5) and (6). Secondly, it is also concerned that any action should be taken by the province which would defeat what in the Dominion's view was the intention of the parties in 1883, and for that reason the Dominion supports the answers given in the Supreme Court to questions (1), (2) and (3). The first matter of importance is that relating to direct taxation.

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(1) [1941] S. C. R. 573.
(2) [1937] A. C. 260, 269.
(3) [1928] A. C. 117, 123.
(4) [1923] A. C. 136, 143.
(5) [1943] S. C. R. 295, 299.
(6) [1943] A. C. 550, 564, 565.

In considering the 6th question it will be assumed that the answers given to questions (4) and (5) in the Supreme Court were right. There is no difference in substance between the tax projected in question (6) and that in question (5). In considering whether the tax in question (6) is an indirect or a direct tax the test to be applied is whether there is a tendency, according to the common understanding of man, that a tax of that description would be passed by the railway company to the person to whom it sells the timber. There would be such a tendency in this case. I invite the Board to approach the question in the way O'Halloran J.A. did when dealing with question (4): "Put shortly, is such a tax direct "or indirect? The tax is on the timber as and when cut; ". . . . It is not a tax on land. It does not arise until the "timber is severed from the land and becomes personalty." I am not overlooking the fact that in question (6) it is described as a tax on land. Whether imposed under question (6), (5) or (4), the tendency would be to pass it on, and if that be the right test each question demands the same answer—it is indirect and ultra vires. There are three authorities in answer to the suggestion that in certain circumstances the railway company might not be able to pass on the tax in whole or in part: *City of Charlottetown* v. *Foundation Maritime Ld.* (1); *Rex* v. *Caledonian Collieries* (2) and *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (3). In *De Waal, N.O.* v. *North Bay Canning Co. Ld.* (4) it was argued that the relevant tax was not indirect because it could not be passed on because of competition; that was rejected, and it was held to be an indirect tax. When it is a question of tendency the form of the tax cannot be decisive and, indeed, can hardly be relevant, whether it is expressed to be on land or timber. As to the "substance" of the tax, there is no difference; "substance" in relation to the question of directness or indirectness means tendency. Where there is a tax imposed on land of which the greater part of the value is timber, then the tendency would be to pass on that part of the tax which is related to the value of the timber. The tax here is indirect. On the question whether the tax would be indirect if it were passed back to the railway company in the event of a sale to some lumber company by lowering of the purchase price, *Bank of Toronto* v. *Lambe* (1) is as near as one can get on the question of passing backwards, though it is not very much in point. It is submitted that it would be as much indirect as in passing forward.

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(1) [1932] S. C. R. 589, 596.
(2) [1928] A C. 358.
(3) [1930] A. C. 357
(4) (1921) S. A. L. R. (A. D.) 521, 527.

On the question of contractual relationship referred to in questions (1), (2) and (3), there is an agreement intended to be binding which would be derogated from if these contemplated taxes were passed. There is certainly an agreement between the Dominion and the province, and no question of any want of power. It was an implied term of the agreement between the Dominion and the province that the province should not derogate from its grant. The Dominion took the island belt and the benefit of the implied terms on trust for the railway company. [Reference was made to *Gregory* v. *Williams* (2), *In re Empress Engineering Co.* (3) *and Mulholland* v. *Merriam* (4).] The answers in the Supreme Court of Kellock and Estey JJ. to the first three questions were correct.

J. W. de B. Farris K.C. replied. The first option in question (6) (*d*) (i) is a bona fide alternative to option (ii). The suggestion has been made that the discount would not be commensurate to the risk involved, and that therefore option (ii) would always be accepted. In the coastal area the annual loss by fire is only 5·5 per cent., but only ·6 of the total amount of timber cut each year is lost by fire. The total loss from insects is small, and there is no windfall loss. There is no difficulty in assessing the risk in determining what is considered a fair purchase price, and there should be no difficulty in arriving at such a discount. The tax itself is a direct tax on the land, and that is not affected by an option for postponement of the time of payment. The second option is valid because it is an alternative to option (i), and it is admitted that even standing alone option (ii) is an actual tax on the land: it is assessed on the land as land; the land is not free from the tax until the tax is paid; the severed timber is not taxable, and there is no lien on it. The submission that this tax is indirect and not a land tax is incorrect. There is no authority to support the proposition that what has happened here is a passing back in the sense of an indirect tax.

Nov. 2. The judgment of their Lordships was delivered

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(1) (1887) 12 App. Cas. 575, 582–3.
(2) (1817) 3 Mer. 582.
(3) (1880) 16 Ch. D. 125.
(4) (1872) 19 Grant, Ch. (U.C.) 288.

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by LORD GREENE, who stated the facts and the questions referred as set out above and continued: It will be seen that if the answer to question (1) is in the affirmative questions (2) and (3) do not arise.

The nature and object of the contention that a contractual relationship came into existence between the province (i.e. the Crown in right of the province) and the contractors and the railway company (either as successors to the contractors or independently in their own right) whereby the railway company became contractually entitled to have and keep the benefit of the tax exemption contained in s. 22 is clearly explained in the following extract from the judgment of O'Halloran J.A. in the Court of Appeal: " . . . . we are not concerned with " s. 22 in its purely statutory status. It stands as a statutory " provision in the same way as any other statutory provision, " viz., until it is amended or repealed. But the contract " argument aims to give it more lasting virtue, viz., that it " reflects a contract between the province and the contractors " that it would not be amended or repealed except as a breach " of contract with consequential remedies to the contractors." In the Court of Appeal O'Halloran J.A. came to the conclusion that there was no contractual relationship between the province and the contractors or the railway company. Their Lordships agree with this conclusion and with the reasoning on which it is based. Bird J.A. was of the same opinion as O'Halloran J.A. Sidney Smith J.A. dissented. In the Supreme Court all members agreed that there was no contract between the province and the contractors, but they all took the view that a contract (or its practical equivalent) between the province and the railway company had been established.

Having regard to the concurrent decisions in the Canadian courts that there was no contractual relationship between the province and the contractors their Lordships do not propose to do more than make some general observations on that topic. Some of them are not without relevance, in their Lordships' view, to the matter of the alleged contract between the province and the railway company. Their Lordships think it right to state clearly that they must not be understood as expressing an opinion as to any moral right to complain of the proposed taxation which the railway company may conceive itself to have. No such matter is raised or, indeed, could be raised by any of the questions referred, which are concerned solely with the legal position. Not only must moral and political considerations be rigidly excluded, but the dividing line between rights and liabilities created by legislation and those created by contract must not be blurred.

Besides involving an offer and an acceptance (either of which may in appropriate cases be expressed in words or by conduct) and the presence of consideration a contract can only come into existence if an intention to contract is present. That negotiations took place, that there were three parties who took part in them, namely, the Dominion government, the provincial government and the contractors, that the negotiations resulted in a definite arrangement under which each party was to play, and did play, its appointed part—all these matters are beyond dispute. Agreements were entered into in contractual form between the province and the Dominion and between the Dominion and the contractors. But there was no such agreement between the province and the contractors, and the whole case under this head rests on the contention that such an agreement ought to be inferred from the documents and the acts of the parties. That the enactment of the Settlement Act and, in particular, of s. 22 thereof was an essential part of the arrangement is again obvious. The whole arrangement would have broken down if the provincial legislature had refused to enact that section. But much more than this would be needed before the existence of a contractual obligation to procure its enactment could be inferred. Even more difficult to infer, in their Lordships' opinion, would be any intention of a contractual nature that the section, when enacted, should remain for all time on the Statute Book. If a promise that it should be put on the Statute Book be assumed, it was a promise by the Crown that there should be enacted something which in its very nature as legislation was susceptible of repeal or amendment by the legislature. The difficulties in the way of extending such a promise so as to include an undertaking by the executive which would be broken if it were thought desirable in the public interest to introduce amending legislation on some subsequent occasion appear to their Lordships to be, for constitutional reasons alone, insurmountable.

But, it is asked, would business men have been content with an arrangement which on a vital matter gave them security of so precarious a nature? It appears to their Lordships that one answer to this criticism would be that if business men had desired to have a binding contractual

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promise of the kind suggested—a promise, indeed, of a character which (to say the least) no government would be likely to give with alacrity—they would have obtained a written contract to that effect and not left it to be merely inferred. Moreover, the lack of security must not, in their Lordships' view, be exaggerated. To have on the Statute Book a section in the terms of s. 22 was in itself an important practical safeguard. What the contractors wanted, and what from the business point of view they were entitled to ask for, was the enactment of the Settlement Act containing s. 22. This they obtained. But they obtained it not by virtue of any contractual right binding on the province but as a mere business matter of fact. Their Lordships find no reason for inferring in addition any contractual right to call for what they in fact obtained, still less a contractual right of such a nature as would give them in law a right to complain of breach of contract if legislation diminishing or taking away the tax exemption conferred by s. 22 were to be passed at a later date. This view is confirmed by the fact that in the case of the Dominion a written contract (the construction contract of August 20, 1883) was entered into with the contractors. This alone makes it impossible in their Lordships' opinion to imply a contract between the contractors and the province, a contract not contained in any writing and of which there is no affirmative evidence. This written contract with the Dominion is one on which alone the contractors might be expected to have relied without requiring it to be supplemented by a further contract with the province. As in their Lordships' opinion no such contractual relationship as is suggested ever came into existence as between the province and the contractors it follows that no such relationship could be claimed by the railway company to exist for its benefit by reason of its succession to the rights of the contractors.

The Supreme Court, however, thought that a contract (or what in practice was its equivalent) between the province and the railway company in its own right and not as successor to the contractors ought to be inferred. Kerwin and Locke JJ., with whom Rand J. was in substantial agreement, thought that the province, by holding out the promised tax exemption as an inducement to the railway company, must be taken to have agreed that it should enjoy the exemption as a matter of contractual right once the railway was constructed. On this view s. 22 is to be regarded as an offer. In the words of Rand J.,

" a statutory benefit arising through the performance of " conditions laid down in the statute as the quid pro " quo of the benefit, is a contractual right : and . . . . upon " performance by the company here, the engagement became " binding upon the Crown " (1). Their Lordships are unable to accept the conclusions of these learned judges. They cannot agree that a section of an Act of Parliament is to be regarded as an offer by the executive ; and there can be no question of an offer by the legislature, which no one suggests could become a party to the supposed contract. Legislation and contract are entirely different methods of creating rights and liabilities and it is essential to keep them distinct. Parliament could no doubt enact that a section of a statute should have the force of an offer by the Crown capable of being accepted by a subject. But here it has not done so, and it is impossible to place such a construction on the simple language of s. 22. The railway company no doubt did rely on s. 22 : but the only inference which, in their Lordships' opinion, can be drawn is that it relied on the section as an existing and valuable piece of legislation and not as an offer capable of being accepted so as to bring into existence a contract binding on the Crown.

Kellock J., although inclined to take the same view as the majority, did not express a concluded opinion on it since he found for the existence of a contractual relationship by another route. " In my opinion " he said, " the lands together with " the immunity from taxation were the subject of a contractual " obligation between the province and the Dominion as to " which the latter was a trustee for the company upon fulfilment of the terms by the company which would entitle it " to a conveyance " (2). Apart from the improbability that the Dominion would have taken upon itself the duties of a trustee towards a subject, their Lordships are unable to find grounds in the facts of the case for holding that any such relationship was ever contemplated. Reliance was placed on s. 3 of the Settlement Act, which grants the land " to the " Dominion Government, for the purpose of constructing, " and to aid in the construction of a railway between Esquimalt " and Nanaimo, and in trust to be appropriated as they may " deem advisable." Their Lordships are unable to construe this reference to a trust as intended to constitute the Dominion a trustee for the railway company. The " trust," if indeed the word is used here in any strict sense, means in their opinion

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(1) [1948] S. C. R. 440.

(2) Ibid. 452.

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no more than that the Dominion is to be under a trust obligation towards the province by which it would be bound to appropriate the land for the purposes indicated. Section 11 of the Terms of Union of 1871, under which British Columbia was admitted to the Dominion, uses the same word " trust " in relation to the land which was to be conveyed to the Dominion thereunder " in trust to be appropriated . . . . in furtherance of the " construction " of a railway to connect the sea-board of British Columbia with the railway system of Canada.

Estey J. also found for a trust enforceable by the railway company. He said : " If the province had been contracting " with the Dunsmuir group for the construction of the railway " a trust would not have been necessary. In order that both " governments might make their respective contributions " and but one government make the contract for the construction of the island railway, the governments with respect " to these lands created a trust. The covenant of the province " with the Dominion to exempt these lands when conveyed " upon the completion of the railway was a term of that trust. " The contractual obligations of the province with respect " to the exemption provided in s. 22 are no different from its " position had it contracted direct with the railway, except " as to questions of enforcement not here in issue " (1). Their Lordships are unable to find any sufficient ground for introducing so complicated a conception into what appears to them, once the respective attitudes taken up by the province and the Dominion are appreciated, a simply and intelligible scheme.

An attempt was made in argument to establish a contractual relationship between the province and the contractors by suggesting that in entering into the construction agreement the Dominion was acting as agent for the province. Their Lordships do not find a trace of evidence which could support such a proposition. Their Lordships do not leave the question of contractual relationship without referring to an alternative argument that such a relationship was affirmed or brought into existence in 1912. In that year an Act was passed by the provincial legislature for the purpose of ratifying an agreement (scheduled to the Act) which had been entered into by the Crown in right of the province and the railway company. The scheduled agreement refers to s. 22 of the Settlement Act and recites that the company wished to lease its railway to the Canadian Pacific Railway Company but wished to be

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(1) [1948] S. C. R. 461.

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assured that such leasing and the operation of the railway by the Canadian Pacific Railway should not affect the exemption from taxation given by the section. It then provided (cl. 1) that the leasing and operation "shall not affect the "exemption . . . . and notwithstanding such lease and operation such exemption shall remain in full force and virtue." By cl. 2 the company agreed to pay to the province an annual sum of 1½ cents per acre of land not used for railway purposes which on the date of payment should be exempt from taxation. By cl. 3 the company agreed to construct and operate an extension of its main line therein described. Their Lordships cannot ascribe to this agreement or to the Act which ratified it any operation beyond that expressed by the language used. The situation was a simple one. The proposed leasing to the Canadian Pacific Railway would, by the express terms of s. 22 of the Settlement Act, have put an end to the exemption granted by that section. The railway company was successful in getting the province to agree that the exemption should be continued notwithstanding the leasing. On its side the railway company agreed to give consideration for this concession, which took the form of an annual payment in respect of lands enjoying the exemption and an undertaking to construct and operate the extension. An Act of Parliament was necessary before the tax exemption could be preserved notwithstanding the leasing. In their Lordships' opinion this was the only effect of the events relied on. They merely had the effect of preserving the existing exemption and did not otherwise extend its operation or alter its character.

Their Lordships now turn to questions (4), (5) and (6). The various forms of tax described in them are not identical with, or confined to, the form of tax recommended by the Commissioner and loosely called by him a "severance tax." Their validity must be determined by reference to the language of the questions themselves and not to expressions used by the Commissioner in his report. The questions are as follows: [His Lordship stated questions (4), (5) and (6) and continued:] Their Lordships do not propose to consider questions (4) and (5). The Supreme Court held that the imposition of the taxes there described would be ultra vires of the provincial legislature and counsel for the appellant did not seek to disturb this finding provided he were to be successful with regard to question (6). As the Board considers that he is so entitled to succeed, the answers of the Supreme Court to questions (4) and (5) will stand.

The Court of Appeal by a majority (Sidney Smith J.A. dissenting) answered question (6) in the affirmative, holding that the tax there described was a direct tax. In the Supreme Court this decision was reversed. The appellant claims that this tax is what it is described in the question to be, namely, a land tax, and that it falls within the category of direct taxation. On behalf of the respondents it is contended that in pith and substance the tax is not a land tax at all, but a timber tax, and therefore indirect, and that in any case, whatever label be attached to the tax, it is in its nature indirect as tending to be passed to persons other than the assessee. Their Lordships have been assisted by very careful and full arguments and a number of authorities have been referred to in which particular taxes were examined to see whether they fell within the category of direct or that of indirect taxation. The principles on which such a question falls to be decided are not, however, in doubt, and their Lordships do not find it necessary to refer to more than a few of the authorities cited. The answer to the question whether the tax is or is not a direct tax is to be found in their opinion primarily by an examination of the nature and effect of the tax as collected from the language describing it.

The tax is described as a " tax on land of the island railway " belt." The provisions proposed are described as being ' substantially as follows." Certain of these provisions are susceptible of more than one meaning and there has been acute controversy as to how they should be interpreted. The first example of this is to be found in para. (*a*) in its application to land " when used " by the railway company for other than railroad purposes. This, it was suggested, must mean that if the railway company determined to cut the timber and sell it the subject-matter of assessments could only be the sites of the individual trees cut and this, it was argued, shewed that the tax was in reality a tax on the timber. But their Lordships are of opinion that this involves too narrow a construction of the word " used." The expression " used by the " railway company " is obviously taken from s. 22 of the Settlement Act. It must, in their Lordships' opinion, be interpreted in a reasonable way and would apply to any area which the railway company might take practical steps to lay out and dedicate to some user other than a railway user and not merely to individual spots in the area (such as the site of a tree) on which actual operations had been put into execution.

Another example is to be found in the first option in para. (*d*), the option to pay the amount of the assessment under "discount." This, it is said, must be interpreted as referring only to a commercial discount based on the present value of money payable in the future. This option therefore, it is said, is a mere sham since no one would choose it, the reason being that such a "discount" would take no account of the risks (e.g., that of fire) which, if they eventuated, would result in no tax being paid at all by a person who had chosen the second option. Counsel for the appellant repudiated on behalf of his clients any intention that the first option should be other than a real option, and he maintained that the "discount" referred to would take into account the risks in question so to give to the owner a real and not a sham option.
While their Lordships might find it difficult to rest on a mere assurance of this kind they think it legitimate and proper to interpret an ambiguous word such as "discount" in a sense which will give reality to the option. In construing questions of this nature, which do not purport to give more than an outline of the proposed legislation, the method applicable in construing a statute must not, in their Lordships' opinion, be too rigidly applied. In the completed legislation many sections of an explanatory or machinery nature would be included. Ambiguities would be cleared up, gaps would be filled, and it may often be necessary in construing what is no more than a "projet de loi" to assume a reasonable intention in that regard on the part of the legislature. Still more, their Lordships think, an intention must not, in the absence of clear words, be ascribed to a responsible legislature of enacting a provision which would be a deliberate and unworthy sham. They therefore construe the word "discount" as including a proper allowance for risks so as to give to the first option a business reality. In the Supreme Court none of the learned judges (except possibly Estey J.) appears to have regarded the first option as a sham, although they thought it most probable that the second option would be preferred. Rand J. (with whom Kellock J. agreed) went further. He said: "I agree . . . . that the first mode must be interpreted as "a substantial equivalent of the second, in which the obvious "risks of the latter both to the province and to the owner are "commuted in terms of money. The discount must be "sufficient to induce a business judgment to accept it as fairly "related to the chances of loss and benefit; and there is no

" more difficulty in estimating such a sum for taxes than for " purchase money " (1). Their Lordships are in agreement with this statement and respectfully adopt it.

The next point to be noted is that the *land* is to be assessed at its fair market value. It is clear, therefore that the subject-matter of the assessment is, ex facie the land and not the timber standing on it. It is said, however, that this too is a sham on the ground that the only value in the land is due to the fact that it has the timber on it ; that the fair market value of the land is the same thing as the fair market value of the timber ; and that accordingly the direction to assess the land is mere camouflage to hide the real intention which is to assess the timber. For the sake of the argument their Lordships are prepared to assume that the timber lands in the belt have at present no substantial value beyond the value of the timber, although such a view ignores the possibility of development of parts, at any rate, for other purposes, including replanting. Locke J. described the lands as " largely " worthless." Estey J. went further and declared that the land " has no value apart from the timber." But the assessments, or some of them, may take place in the distant future when parts of the land itself may have acquired a value of their own irrespective of the timber. Their Lordships think that such a possibility cannot be ignored. But, however this may be, the argument appears to their Lordships to confuse the subject-matter of taxation with that element comprised in the subject-matter which gives to it its value for assessment purposes. It simply is not the case that a tax on land is the same thing as a tax on timber, however minute or even non-existent may be the difference in value of the land and of the timber. The importance of this distinction between the land and the timber will appear later, and their Lordships are in agreement with what was said by O'Halloran J.A. on this topic in the following passage : " Because land bears " a tax which is measured by the reflected value of its products " is no reason to say that the tax on the land is a colourable " tax on its products, and that such a tax is not in truth " a tax on the land itself."

Under para. (*c*) it is the owner of the land who is to be taxed, the tax is to be a percentage of the assessed value, and the tax is charged on the land. Now it is possible that the ownership of the land and the ownership of the timber may come

(1) [1948] S. C. R. 443.

into different hands: nevertheless it will be the owner of the land and not the owner of the timber who will be liable to the Crown for the tax. The fact that the tax is to be a charge on the land is in their Lordships' opinion of great significance. There is no charge on the cut timber. If a landowner cuts the timber on part of his assessed land and makes default in payment of the tax the Crown will be entitled to enforce its charge not against the timber already cut but against his land, even though the only land of any value is the remainder of the assessed land with the timber trees which stand on it and are part of it. This appears to their Lordships to point clearly to the view that the proposed tax is in truth a tax on the land and not a tax on timber. In relation to the amount of the tax it was argued that what in reality was being aimed at was to compel the payment of a sum arrived at in the same manner as a royalty, and that the valuation required would have to be conducted in the manner required for the fixing of a royalty, i.e., a valuation of the timber made on what is called a "cruise." Reliance was placed on para. 12 of the statement of facts agreed between counsel on December 13, 1946, which says "that questions 4, 5 and 6 are to be considered "on the assumption that the tax would be on a scale equivalent "to the tax recommended by the Commissioner." Their Lordships, however, are of opinion that this argument is based on a misconception both of the description of the tax contained in question (6) and also of the paragraph in the agreed statement of facts. That paragraph, they were informed, was agreed merely for the purpose of indicating that the tax might be at least as high as the amount which might have been obtained in the case of a royalty, not that it would necessarily be so. The argument might perhaps have had some substance in the case of question (5), which states that the tax there is to "approximate the prevailing "rates of royalty." No such phrase appears in question (6), where the only statement as to the amount of the tax is that it is to be "a percentage of the assessed value" of the land. It would be for the legislature to fix that percentage which might, of course, but need not, be so calculated as to produce an amount roughly equivalent to what a royalty, had it been payable, might be estimated to have produced. This is far from leading to or supporting the conclusion that the proposal is merely a concealed method of exacting the equivalent of a royalty, or that the assessment would be made on a valuation

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of the trees only conducted in the same manner as a valuation for royalty purposes.

Paragraph (*d*) is expressed in language appropriate for a machinery section as distinct from the charging section, which is para. (*c*). On its face it only deals with the time for payment. Their Lordships have already dealt with the meaning of the first option contained in sub-para. (i). Had they thought that this option was a sham, and intended to be such, it might well have affected their view as to the real nature of the tax. But interpreting it as they do as a real option honestly given they find that para. (*d*) does nothing more than fix two alternative times for payment of the tax. It would, their Lordships consider, be contrary to sound principles of construction to interpret such an option as doing more than what it purports to do, i.e., to give to the taxpayer the right to choose when he will pay a tax the nature of which has already been fixed and declared. It is natural that the legislature in imposing a tax of this nature should give the assessee the opportunity to defer payment until such time as he could provide himself with the necessary money by reaping the produce of his land. This is what sub-para. (ii) purports to do, and nothing more. The granting of such an opportunity must in its nature be related to the progressive realization of the value of the timber by cutting: it could not be defined otherwise, and their Lordships do not think it right to interpret language, which of necessity had to be used for that purpose, as establishing or helping to establish the proposition that the tax is really a tax on timber and not on land.

A subsidiary argument was raised in connexion with sub-para. (ii). It was said that the phrase "the value of the trees "cut" must mean their market value at the time of cutting, and that if the value of timber were to fall it might result that all the timber on a piece of land might be cut without a sum sufficient to discharge the whole of the assessment on that piece being obtained. Although the phrase in question is susceptible of this meaning their Lordships are disposed to think that "the value" referred to is intended to refer to the value at the time of the assessment, so that the result suggested would never arise. But in any case, the suggested construction does not, in their Lordships' opinion, give any substantial support to the proposition for which it is used, namely, that the tax is in reality a tax on timber, for the reason that, if the price of timber fell sufficiently, no tax

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would be payable after all the timber had been cut. Even if that is what the sub-paragraph means when read by itself, it does not appear to their Lordships to follow that the balance of the tax would never have to be paid. The tax is assessed on the owner of the land and it is quite consistent with the language of the question that machinery should be provided for recovering from the owner any amount remaining unpaid after all the timber had been cut. Moreover, it may be added that if, instead of falling, the price of timber were to rise, then, on the construction suggested, the tax might be wholly satisfied before the whole of the timber was cut, leaving the owner of the land free to realize the value of the uncut timber without incurring any further tax liability.

The conclusion, therefore, at which their Lordships have arrived is that the tax is in reality a tax on land and not a timber tax. The existing land tax imposed by provincial legislation is imposed on both timber-bearing lands and non-timber-bearing lands. The proposed tax, it is argued, is really of a different nature since it is an extraordinary tax in the matter of amount, discriminatory because it is only exigible in the case of the railway lands and calculated (and indeed intended) to deprive the railway company of a large part of the benefit originally granted to it by reducing the value of its land. None of these considerations, even if they be regarded as correct, appear to their Lordships to be relevant to the only matter raised by question (6), namely, that of ultra vires. If the tax is a land tax the fact that it specifically affects the company detrimentally cannot make it in " pith " and substance " something else, namely, a camouflaged timber tax, however relevant the detriment to the company might have been to the argument (already disposed of) based on the alleged contractual relationship.

There is, indeed, one difference between the proposed tax and the ordinary land tax which must be noted and examined to see how far the analogy is affected. The existing land tax of the province is, as their Lordships understand, an annual tax in the nature of a royalty, whereas what is here proposed is a special impost to be discharged once for all, either as a single discounted sum or by way of a series of instalments. But it does not seem that this distinction assists the respondents in their contention that the tax is in reality a tax on timber.

It is argued, however, that the tax, whatever name be given to it, is an indirect tax because the natural tendency for the

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person who is to be assessed to it will be to pass it to others and thus indemnify himself against it. This operation of passing, it is said, would take one or other or both of two forms—a " passing back " to the railway company by means of a lowering of the purchase price, and a " passing on " to purchasers of the cut timber. It is probably true of many forms of tax which are indisputably direct that the assessee will desire, if he can, to pass the burden of the tax on to the shoulders of another. But this is only an economic tendency. The assessee's efforts may be conscious or unconscious, successful or unsuccessful; they may be defeated in whole or in part by other economic forces. This type of tendency appears to their Lordships to be something fundamentally different from the " passing on " which is regarded as the hallmark of an indirect tax. Moreover, in all the cases where various forms of tax have been discussed not one instance has been found of what in the present case is described as " passing " back." Their Lordships are not prepared to hold that this tendency in the present case produces, or helps to produce, an indirect quality in the tax. Moreover, the tax is assessed after and not before a sale, and may not become payable for a considerable time thereafter. Whatever is " passed back " in the form of economic consequence by way of reduction of purchase price, it cannot be the *tax*. Mill's well-known formula is that a direct tax is one which is demanded from the very persons who it is intended and desired should pay it, while indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. In *City of Halifax* v. *Fairbanks' Estate* (1), Lord Cave, in delivering the judgment of the Board, used expressions which, if not correctly understood, might appear to lay down too rigid a test for the classification of taxes; but, as is pointed out by Lord Simon L.C. in the judgment of the Board in the later case of *Atlantic Smoke Shops, Ld.* v. *Conlon* (2), those expressions " should not be " understood as relieving the courts from the obligation of " examining the real nature and effect of the particular tax " in the present instance, or as justifying the classification of " the tax as indirect merely because it is in some sense " associated with the purchase of an article." In the latter case a somewhat complicated method of taxing the consumption of tobacco was adopted. It was held to be a direct tax because it was imposed on the actual consumer on the occasion of a purchase by him. A similar result from the revenue point of view could no doubt have been secured by imposing the tax on the manufacturer or on the vendor. But such a tax would have been an indirect tax since the operation of passing the burden of the tax to the consumer in the shape of an increase of price would have been in practice almost automatic. This case, in their Lordships' view, affords a good example of the caution with which the "pith and sub-" stance" principle ought to be applied. The object of that principle is to discover what the tax really is; it must not be used for the purpose of holding that what is really a direct tax is an indirect tax on the ground that an equivalent result could have been obtained by using the technique of indirect taxation. The use of the word "camouflage" in the argument of the respondents appears to their Lordships to be due to a misapplication of the principle.

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(1) [1928] A. C. 117.

(2) [1943] A. C. 550, 565.

Question (7) was as follows: [His Lordship stated the question and continued:] It is agreed that the relevant section of the Forest Act is 124 and not 123. The Court of Appeal by a majority (O'Halloran J.A. dissenting) held that the levy in question was a service charge and not a tax, and did not derogate from the provisions of s. 22. The Supreme Court unanimously reversed this decision. Their Lordships agree with the Supreme Court. The question is a short one. The exemption conferred by s. 22 is given in the words "The "lands . . . . shall not be subject to taxation." There is no context to give to the word "taxation" any special meaning, and the question therefore comes to this: "Is the impost "charged by s. 124 of the Forest Act 'taxation' within the "ordinary significance of that word?" The Forest Act contains an elaborate code relating to the control and administration of forestry and forest lands. These lands form an important part of the national wealth of the province and their proper administration, including in particular protection against fire, is a matter of high public concern, as well as one of particular interest to individuals. Part XI of the Act, consisting of ss. 95 to 127, deals with what is described as "Forest Protection." It contains detailed regulations with regard to the kindling of fires, precautions against fires, fire fighting, compulsory assistance and similar matters. Section 124 provides that from the owners of timber land "there shall be payable and paid to the Crown on the first

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" day of April in each year an annual tax at the rate of six " cents for each acre." These payments are to be placed to the credit of a fund " in the Treasury to be known as the " ' forest protection fund,' " and are made recoverable by action at the suit of the Crown. An annual sum of $1,650,000 is to be added out of the consolidated revenue fund. Advances may be made out of the consolidated revenue fund to meet charges incurred before the full collection of the tax or to cover deficiencies. In the case of a deficiency or a surplus there is power to increase or decrease the levy as the case may be. The forest protection fund is applicable for a variety of purposes connected with the protection of forest lands, including the maintenance and equipment of a fire-prevention and protection force, the construction of trails, look-out stations, etc., and the payment of expenditure incurred by any person in fighting fires. The legislature has thus thought it proper to divide the expense of what is a public service of the greatest importance to the province as a whole between the general body of taxpayers and those individuals who have a special interest in having their property protected. The levy has what are, undoubtedly, characteristics of taxation, in that it is imposed compulsorily by the State and is recoverable at the suit of the Crown. It is suggested, however, that there are two circumstances which are sufficient to turn the levy into what is called a " service charge." They are, first, that the levy is on a defined class of interested individuals and, secondly, that the fund raised does not fall into the general mass of the proceeds of taxation but is applicable for a special and limited purpose. Neither of these considerations appears to their Lordships to have the weight which it is desired to attach to them. The fund is made up partly of the levy and partly by contributions from the taxes paid by the general body of taxpayers. This is no doubt a reasonable apportionment of the burden, for to impose the cost of services which are of general interest to the community as well as a particular interest to a class of individual exclusively on one or the other might well have seemed oppressive. The fact that in the circumstances the persons particularly interested are singled out and charged with a special contribution appears to their Lordships to be a natural arrangement. Nor is the fact that the levy is applicable for a special purpose of any real significance. Imposts of that character are common methods of taxation—taxation for the road fund in this country was

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a well-known example. The objects of the legislature in adopting such a form of tax may be various. But if it finds it convenient to do so the impost, if in other respects it has the character of a tax, does not thereby change its character.

In the result their Lordships will humbly advise His Majesty that save as regards the answers of the Supreme Court to Questions (4), (5) and (7) this appeal should be allowed. There will be no order as to costs.

Solicitors for appellant: *Gard, Lyell & Co.*

Solicitors for the Esquimalt & Nanaimo Ry. Co., and for the Alpine Timber Co., Ld.: *Blake & Redden.*

Solicitors for the Attorney-General for Canada: *Charles Russell & Co.*

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[PRIVY COUNCIL.]

CANADIAN PACIFIC RAILWAY COMPANY . . . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . . . RESPONDENT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . . . INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—British Columbia—Hours of work legislation—Hotel owned by railway company—Whether part of railway works and undertaking—Applicability of hours of work Act to hotel employees—British North America Act, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91; *s.* 92, *head* 10 (*a*) (*c*), 13—*Hours of Work Act, R. S. B. C.* 1936, *c.* 122 (*as amended by c.* 34 *of* 1946).

The appellant, the Canadian Pacific Ry. Co., which owned and managed the Empress Hotel in Victoria, British Columbia, while not denying that the regulation of hours of work was ordinarily a matter of "property and civil rights in the province" under head 13 of s. 92 of the British North America Act, 1867, and accordingly within the legislative competence of the provincial

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**Present:* LORD PORTER, LORD GREENE, LORD MORTON OF HENRYTON, LORD REID and RINFRET C.J. of Canada.

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legislature, contended, inter alia, that the company's activities had become such an extensive and important element in the national economy of Canada that the Dominion Parliament was entitled under the general powers conferred by the first part of s. 91 of the Act of 1867 to regulate all the affairs of the company, even where that involved legislating in relation to matters exclusively reserved to the provincial legislatures by s. 92.

Held, first, that there was neither principle nor authority to support the competence of the Parliament of Canada to legislate on a matter which clearly fell within the enumerated heads of s. 92 and could not be brought within any of the heads of s. 91 merely because the activities of one of the parties concerned in the matter had created a unified system which was widespread and important in the Dominion.

Principles stated in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* [1896] A. C. 348, at 360–1, held applicable.

Held, secondly, that the hotel was not a part of the company's railway works and undertaking connecting the province of British Columbia with other provinces within the meaning of head 10 (*a*) of s. 92 of the British North America Act so as to be excepted from provincial legislative authority and brought within the Dominion legislative power by virtue of head 29 of s. 91, but was a separate undertaking. The provision in s. 8 of Canadian Pacific Railway Act, 1902, that the company might carry on hotel business " for " the comfort and convenience of the travelling public " did not require the appellant to cater exclusively or specially for those who were travelling on its system. There was little, if anything, in the facts to distinguish the Empress Hotel in regard to its activities from an independently-owned hotel in a similar position.

Canadian Pacific Ry. Co. and Canadian Pacific Express Co. v. *Attorney-General for Saskatchewan* [1947] 2 W. W. R. 909, referred to.

Held, thirdly, that for reasons similar to those on which it was held that the hotel was not a part of the railway works and undertaking, it also did not fall within the definition of " railway " in s. 2 (21) of the Railway Act, 1927, and accordingly was not " declared to be a work for the general advantage of Canada " within the meaning of s. 6 (*c*) of the Act of 1927. It was not therefore excepted under head 10 (*c*) of s. 92 of the British North America Act from provincial legislative competence.

The provisions of the Hours of Work Act, R. S. B. C. 1936, c. 122, as amended in 1946 (c. 34), which provided that the working hours of an employee in any industrial undertaking should not exceed eight in the day and forty-four in the week, were therefore applicable to, and binding on, the appellant company in respect of its employees employed at the Empress Hotel.

Judgment of the Supreme Court of Canada, [1948] S. C. R. 373, affirmed.

APPEAL (No. 13 of 1949), by special leave, from a judgment of the Supreme Court of Canada (April 27, 1948) affirming

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a judgment of the Court of Appeal for British Columbia (March 27, 1947).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: In 1946 the legislature of the province of British Columbia enacted an amendment of the Hours of Work Act, under which it was provided that the working hours of an employee in any industrial undertaking should not exceed eight in the day and forty-four in the week. The appellant owned and managed the Empress Hotel in Victoria, B.C., and the definition of industrial undertaking in the Hours of Work Act was such as to include a large number of the appellant's employees who worked in that hotel. The appellant did not dispute that, in general, regulation of hours of work was a subject exclusively reserved to provincial legislatures under s. 92 of the British North America Act, 1867; but it was contended for the appellant that it was not within the power of the provincial legislature to regulate the hours of work of any of the employees in the Empress Hotel and that the hours of work of those employees must be determined by an agreement between representatives of the appellant's employees and the appellant which was made binding by an Act of the Parliament of Canada (1947, 11 Geo. VI c. 28 s. 1). That agreement provided for a 48-hour week. To determine that matter an order of reference was made by the Lieutenant-Governor of British Columbia on September 21, 1946, by which the following question was referred to the Court of Appeal for British Columbia for hearing and consideration. " Are the provisions of the " Hours of Work Act, being chapter 122 of the Revised Statutes " of British Columbia, 1936, and amendments thereto, applic- " able to and binding upon Canadian Pacific Railway Company " in respect of its employees employed at the Empress Hotel, " and if so, to what extent ? "

The facts regarding the Empress Hotel were stated in the order of reference as follows : " The said company has further, " for the purposes of its lines of railway and steamships and " in connexion with its said business, built the Empress Hotel " at Victoria, which it operates for the comfort and con- " venience of the travelling public. The hotel is available " for the accommodation of all members of the public, as " a public hotel. The said hotel caters for public banquets " and permits the use of its hotel ballroom for local functions, " for reward. The property upon which the said hotel is

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"built is not contiguous to property used by the company "for its line of railway, and is not a terminus for its railway "line or steamships. The company has owned and operated "the said hotel for a period of thirty-eight years, and the same "provides accommodation for large numbers of travellers "and tourists from Canada, the United States of America "and elsewhere, having five hundred and seventy-three "rooms. The operation of the hotel is a means of increasing "passenger and freight traffic upon the company's lines of "railway and steamships. The company owns and operates "other hotels elsewhere in Canada for like purposes. There "is a catering department in the hotel wherein the company "employs persons to prepare and serve meals. The company "also employs hotel clerks, bookkeepers and other persons "to do clerical work at the hotel."

The determination of this appeal depended on the application to the facts of this case of the provisions of ss. 91 and 92 of the British North America Act, 1867. The relevant portions of those sections were :—

> "91. It shall be lawful for the Queen, by and with the "advice and consent of the Senate and House of Commons, "to make laws for the peace, order, and good government "of Canada, in relation to all matters not coming within "the classes of subjects by this Act assigned exclusively "to the legislatures of the provinces; and for greater "certainty, but not so as to restrict the generality of the "foregoing terms of this section, it is hereby declared that "(notwithstanding anything in this Act) the exclusive "legislative authority of the Parliament of Canada extends "to all matters coming within the classes of subjects next "hereinafter enumerated; that is to say:—
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> * * * * *
>
> "29. Such classes of subjects as are expressly excepted "in the enumeration of the classes of subjects by this Act "assigned exclusively to the legislatures of the provinces.
>
> "And any matter coming within any of the classes of "subjects enumerated in this section shall not be deemed "to come within the class of matters of a local or private "nature comprised in the enumeration of the classes of "subjects by this Act assigned exclusively to the legislatures "of the provinces.
>
> "92. In each province the legislature may exclusively

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"make laws in relation to matters coming within the classes "of subjects next hereinafter enumerated; that is to say:

* * * * *

"10. Local works and undertakings other than such as "are of the following classes:—

"(*a*) Lines of steam or other ships, railways, canals, "telegraphs, and other works and undertakings connecting "the province with any other or others of the provinces, "or extending beyond the limits of the province:

"(*b*) Lines of steam ships between the province and "any British or foreign country;

"(*c*) Such works as, although wholly situate within the "province, are before or after their execution declared "by the Parliament of Canada to be for the general "advantage of Canada or for the advantage of two or "more of the provinces.

* * * * *

"13. Property and civil rights in the province.

* * * * *

"16. Generally all matters of a merely local or private "nature in the province."

On March 27, 1947, the Court of Appeal (Sloan C.J.B.C., Robertson, Smith and Bird JJ.A., O'Halloran J.A. dissenting) answered the question in the order of reference in the affirmative. On appeal the Supreme Court of Canada (Kerwin, Taschereau, Rand, Kellock and Estey JJ.) unanimously decided on April 27, 1948, that the judgment of the Court of Appeal for British Columbia should be affirmed and the appeal dismissed. From that judgment this appeal was taken by special leave to His Majesty in Council.

1949. July 13, 14, 18, 19, 20. *C. F. H. Carson K.C.* (Canadian Bar), *Gahan*, and *Allan Findlay* (Canadian Bar) for the appellant. The courts in Saskatchewan in litigation which raised an issue substantially similar to that in the present case have taken a directly contrary view to that of the Supreme Court in this case: *Canadian Pacific Railway and Canadian Pacific Express Co.* v. *Attorney-General for Saskatchewan* (1), which was affirmed on appeal (2). It is submitted in outline for the appellant: (*a*) The appellant has a transportation system which is one integrated system.

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(1) [1947] 4 D. L. R. 329, 331.

(2) [1947] 2 W. W. R. 909.

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including ocean marine services; main and branch lines owned and operated by the appellant; services of passenger and goods trains; inland and coastal steamship services; airplane and telegraph services; stations with refreshment, lavatory and other amenities; a chain of trans-continental hotels, goods depots, wharfs, warehouses, grain elevators and other activities. (*b*) This unified system is a national undertaking which cannot reasonably be viewed as a conglomeration of local works and undertakings. (*c*) The Empress Hotel is an integral part of this unified system. (*d*) Properly viewed as a unified system, the appellant's undertaking and the works comprised therein, including its hotels, do not come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by s. 92 of the British North America Act, 1867, assigned exclusively to the legislatures of the provinces: *John Deere Plow Co., Ld.* v. *Wharton* (1). (*e*) Accordingly, the appellant's whole system, including its hotels, is within the legislative authority of the Parliament of Canada under its authority to make laws in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. The jurisdiction of the Dominion Parliament in relation to through railways is mentioned in *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (2), *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (3), *Toronto Corporation* v. *Canadian Pacific Railway* (4) and *Grand Trunk Railway of Canada* v. *Attorney-General for Canada* (5), in which it was said: "It "is not disputed that, in the partition of duties effected by the "British North America Act, 1867, between the provincial "and Dominion legislatures, the making of laws for through "railways is entrusted to the Dominion" (6). The only proper way to treat the whole of the appellant's system is as a unit which falls outside the whole enumerations of local matters contained in s. 92 of the Act of 1867, and the result is that the only power of legislation which exists in relation to the system regarded in that way is the plenary power of the Dominion Parliament under s. 91. [Reference was also made to *In re The Regulation and Control of Aeronautics in*

(1) [1915] A. C. 330, 340.
(2) [1899] A. C. 367, 371.
(3) [1906] A. C. 204, 210.
(4) [1908] A. C. 54, 58.
(5) [1907] A. C. 65.
(6) Ibid. 67.

Canada (1) and *In re The Regulation and Control of Radio Communication in Canada* (2).]

The next proposition, (*f*) is that even if, contrary to the appellant's contention, any part of the appellant's system could reasonably and properly be regarded as a local work or undertaking, it is submitted (*a*) that the Empress Hotel is included in the appellant's works and undertaking, and on the true interpretation of head 10 (*a*) of s. 92 of the British North America Act comes within the exclusive legislative authority of the Parliament of Canada: (*b*) that, further, the Empress Hotel is included in the works of the appellant declared by the Parliament of Canada under head 10 (*c*) of s. 92 to be for the general advantage of Canada and is also on that ground within the exclusive legislative authority of the Dominion Parliament. If the appellant company as a national transportation undertaking does not come within the exclusive legislative authority of the Parliament of Canada by virtue of the general powers given in s. 91, then the transportation system of the company, including its hotels, is within the exclusive legislative authority of that Parliament by virtue of head 10 (*a*) of s. 92 read with head 29 of s. 91. There is first a question of fact—that the primary purpose of the hotel is to serve the public who use the transportation service of the appellant company—and secondly, the construction of head 10 (*a*). " Railways " is used in that head in a comprehensive sense to embrace the whole of the works and undertaking of such railway. The majority in the courts below put too narrow an interpretation on head 10 (*a*) when they singled out the head " railways " by itself without giving due weight to the context in which that one word appears. [Reference was made to *Luscar Collieries* v. *McDonald* (3), *Lancashire and Yorkshire Railway* v. *Liverpool Corporation* (4) and *Grand Trunk Railway* v. *James* (5).] The word " railways " in head 10 (*a*) read in conjunction with the words " other works and undertakings " must be given a comprehensive interpretation and not one which would split the appellant's works and undertakings into bits and pieces, some under Dominion and some under provincial jurisdiction: *Toronto Corporation* v. *Bell Telephone Company of Canada* (6). It was said in the *Regulation and Control of Radio Communica-*

(1) [1932] A. C. 54, 77.
(2) [1932] A. C. 304, 314.
(3) [1927] A. C. 925.
(4) [1915] A. C. 152.
(5) (1901) 31 S. C. R. (Can.) 420, 432.
(6) [1905] A. C. 52, 59.

tion case (1) that " 'undertaking' is not a physical thing, but " is an arrangement under which, of course, physical things " are used." See also *The King* v. *Eastern Terminal Elevator Co.* (2)—an hotel is as much an adjunct to a railway as a grain elevator. As to what is comprised within the works and undertaking of a transportation system some of the judges below relied on *Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (3), but it is difficult to understand how that case can be conclusive of the question here. On the true interpretation of head 10 (*a*) the hotel system of the Canadian Pacific Railway, of which the Empress Hotel is a part, would be included in the works and undertaking of the railway.

Alternatively, it is submitted that apart altogether from the question raised under head 10 (*a*), the hotels are included in the works under head 10 (*c*) for the general advantage of Canada. By s. 6 (*c*) of the Railway Act, 1927, railways are declared to be works for the general advantage of Canada, and " railway " is defined in s. 2 (21) of the Act of 1927 as meaning, inter alia, " property real or personal and works " connected therewith " and " any railway bridge, tunnel or " other structure which the company is authorised to con- " struct." Hotels are not only real property connected with the railway, but are works connected with it. " Connected " therewith " cannot mean physically. Also, " other " structure " should be given the interpretation given by MacDonald J.A. in the *Saskatchewan* case (4).

Assuming that the appellant is right on any one of the first three general submissions, i.e., that the hotel is included in the works and undertaking of the appellant company that are within the exclusive legislative authority of the Parliament of Canada either (*a*) by virtue of the general powers conferred by the introductory part of s. 91, or (*b*) by virtue of head 10 (*a*) of s. 92, or (*c*) by virtue of the declaration made under head 10 (*c*) of s. 92, then the next submission is that the regulation of the hours of work of all employees of such works and undertaking is within the exclusive legislative jurisdiction of the Dominion Parliament. The management of such works and undertakings is within the exclusive jurisdiction of the Dominion, and such management includes the regulation of the hours of work of the employees, which is therefore beyond the provincial competence. Hours of work

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(1) [1932] A. C. 304, 315.

(2) [1925] S. C. R. (Can.) 434.

(3) [1922] 1 A. C. 202, 207.

(4) [1947] 2 W. W. R. 909, 924.

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should be uniform throughout the Dominion, and particularly so in the case of a transportation system. If the regulation of hours of work is within exclusive Dominion jurisdiction it is clearly withdrawn from the provincial legislature, and it matters not whether the Dominion has or has not dealt with the subject: *Attorney-General for Canada* v. *Attorney-General for the Province of Quebec and Others* (1). On that view it would not be necessary to consider whether by introducing s. 27A of the Canadian National-Canadian Pacific Act, 1933, which regulates the hours of work of the employees of the appellant company in its hotels, the Dominion had occupied the field. [Reference was also made to *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (2), *In re Alberta Railway Act* (3).] Alternatively, it is submitted that the Dominion in legislating in relation to railway works and undertakings may properly legislate about hours of work as ancillary or incidental thereto. In the present case the Parliament of Canada has exercised this legislative power by enacting s. 27A, which therefore supersedes the provincial Statute in relation to the Empress Hotel employees. Authorities on the submission that the regulation of hours of work is in the exclusive Dominion field or is ancillary or incidental thereto are *In re Railway Act Amendment*, 1904 (4), *In re Legislative Jurisdiction over Hours of Labour* (5), *Attorney-General for Canada* v. *Attorney-General for Ontario* (6), *In re a Reference as to the Applicability of the Minimum Wage Act of Saskatchewan to an Employee of a Revenue Post Office* (7) and *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (8). The provincial Act is inoperative in respect of the hotel's employees, and the question referred should have been answered in the negative.

Gahan, and *W. R. Jackett* (Canadian Bar), for the Attorney-General for Canada, intervener, adopted and relied on the argument for the appellant.

J. W. de B. Farris K.C., *H. Alan Maclean* and *John L. Farris* (all of the Canadian Bar) for the respondent, the Attorney-General for British Columbia. First, with regard to the submission that the appellant's system as an integrated system is entirely outside the subjects of s. 92 of the British North America Act, " property and civil rights " under s. 92 (13) is exclusively within the legislative jurisdiction of the province, and if the Dominion right to legislate under s. 91 for peace, order and good government is only in respect of matters not assigned exclusively to the province, it must necessarily follow that there can be no interference with the Hours of Work Act, which deals with property and civil rights under s. 92 (13). For legislation otherwise within provincial jurisdiction to be valid Dominion legislation on the ground of national importance it is essential that the matter of national importance should transcend " property and civil rights " : *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (1) ; *Attorney-General for Canada* v. *Attorney-General for Ontario* (2) ; *Reference re The Natural Products Marketing Act*, 1934, *and its Amending Act*, 1935 (3). The Hours of Work Act comes within the classes of subjects assigned exclusively to the legislatures of the provinces, and the regulation of the hotel business is a matter of local concern or interest and not a matter of national concern. Secondly, the Empress Hotel is not a part of a " railway " within the meaning of head 10 (*a*) of s. 92 of the British North America Act, notwithstanding that the operation of hotels is within the company's statutory powers : Canadian Pacific Railway Act, 1902, s. 8. [Reference was made to *City of Montreal* v. *Montreal Street Ry.* (4) and to the *Radio Communication* case (5).] The determining words in head 10 (*a*) are " connecting the province with any other or others " of the provinces." An undertaking of a railway company may be a much wider thing than the undertaking of the railway, and a very careful distinction has to be made between the two. We are concerned here with a matter of substance : it was said in *Shannon* v. *Lower Mainland Dairy Products Board* (6) that " if, on the view of the Statute as a whole, you " find that the substance of the legislation is within the express " powers, then it is not invalidated if incidentally it affects " matters which are outside the authorized field." That supports the submission that the purpose which the directors of the appellant company had in building this hotel does not determine a thing of substance—as to what this hotel is in relation to the railway. While not attempting to base my case only on the following authorities, they do throw some light on the meaning of "railway": *Midland Ry. Co.* v. *Ambergate, Nottingham and Boston and Eastern Junction Ry. Co.* (1); *Milner* v. *Great Northern Ry.* (2); *London County Council* v. *Attorney-General* (3). *Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (4) has a precise bearing on, and supports, the position of the respondent here. There are no cases which support the argument for the appellant as to what a railway is. [Reference was also made to *Quebec Railway Light & Power Co.* v. *Town of Beaufort* (5), and *Luscar Collieries Ld.* v. *N. S. McDonald* (6), where it was said that "railways "are works within the meaning of para. (*a*), because they are "mentioned as exceptions from the general class of local "works; so likewise are they works within the meaning of "para. (*c*)"; and, on appeal, the Privy Council agreed with that (7).] "Railway" is not to be given too wide a meaning. It is a class of subject which includes within its ambit (*a*) the physical structure of the railway, including rights of way and appurtenances; (*b*) the physical equipment necessary for the railway as a means of transportation; (*c*) the organization used in connexion with the railway as a means of transportation includes employees; (*d*) a dining room and sleeping accommodation for the use of passengers: it would include a restaurant where necessary for the sustenance of passengers in the actual course of their journey. Hotel systems, however, are not confined to railways, and there is no reason why one system of hotels should have one type of control and other systems a different one. Further, legislation regulating hotels and hotel employees is not legislation "necessarily ancillary" to the legislative power of the Dominion over "railways" so as to justify Dominion legislation in this respect: *Attorney-General for Canada* v. *Attorney-General for British Columbia* (8) is decisive on this point. Also, since it is not ancillary legislation inasmuch as it is strictly property and civil rights, s. 27A has no application.

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(1) [1947] A. C. 33, 43.
(2) [1899] A. C. 367, 372.
(3) (1913) 48 S. C. R. (Can.) 9; [1915] A. C. 363.
(4) (1905) 36 S. C. R. (Can.) 136, 144; [1907] A. C. 65, 67.
(5) [1925] S. C. R. (Can.) 505, 508.
(6) [1937] A. C. 326, 342, 350.
(7) [1948] S. C. R. (Can.) 248, 257, 271.
(8) [1920] A. C. 184.

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(1) [1923] A. C. 695, 703.
(2) [1937] A. C. 326, 353.
(3) [1936] S. C. R. (Can.) 398, 414.
(4) [1912] A. C. 333, 345.
(5) [1932] A. C. 304, 314–6.
(6) [1938] A. C. 708, 720.

Next, the Empress Hotel has not been declared a work

(1) (1853) 10 Hare 359, 369.
(2) [1900] 1 Q. B. 795.
(3) [1902] A. C. 165.
(4) [1922] 1 A. C. 202.
(5) [1945] S. C. R. (Can.) 16.
(6) [1925] S. C. R. (Can.) 460, 487.
(7) [1927] A. C. 925, 932.
(8) [1930] A. C. 111, 118.

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"for the general advantage of Canada" under head 10 (*c*) of s. 92 of the British North American Act so as to bring the hotel within the exclusive legislative jurisdiction of the Dominion. There is an important question of principle involved in the interpretation of head 10 (*c*), which is sui generis and is the only provision in the British North America Act which enables the Parliament of Canada to transfer jurisdiction from the province to the Dominion. The declaration must be such as to make it clear what Parliament has done. This declaration in s. 6 (*c*) of the Railway Act, 1927, is one of right, it does not single out hotels at all. If there be any doubt it certainly should be resolved against the appellant's contention. So far as the interpretation of the definition of "railway" in s. 2 (21) of the Act of 1927 is concerned, it was said in *Montreal Trust Co.* v. *Canadian National Ry. Co.* (1) that "'railway' "is defined by the Act in such a way as to restrict its meaning, "unless the context otherwise requires, to the track and its "physical appurtenances. Their Lordships are unable to "conceive how providing a residence for an official of the "company could be a purchase of land necessary for the "railway as defined by the Act." Further, as Kellock J. said in the Supreme Court in the present case, "under cl. (*c*) "of s. 92 (10) a declaration may be made only with respect to "a work 'wholly situate within the province,' *Toronto Corporation* v. *Bell Telephone Company of Canada* (2). The 'railway' "of the appellant company is not so situate." Even assuming, therefore, that the hotel comes within the definition of "railway" in s. 2 (21) the declaration would not be effective with regard to it.

H. Alan Maclean followed. The proper test of what can properly be included in "railway" in head 10 (*a*) was applied by Rand J. in this case: "It is conceivable, also, that dining "rooms and sleeping quarters along its lines, certainly in the "early days of its operation, might well have come within "its public obligations towards passengers and to have been "a necessary part of its railway functions. But I think it "impossible to bring this hotel within that accommodation. "It is a public hotel to which all travellers have a right of "access." That test is both practical and just, and to apply any other would permit the inclusion of almost any activity in connexion with a railway. The hotel business is no part of the "railway," but is a different and separate business which the appellant company is managing for business purposes.

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(1) [1939] A. C. 613, 625.

(2) [1905] A. C. 52, 60.

H. J. Wilson K.C. (Canadian Bar) for the Attorney-General for Alberta, intervener, adopted the argument for the respondent, and dealt only with the point whether the Empress Hotel was within the exceptions of head 10 (*a*) or (*c*) of s. 92. The true position is that the Hours of Work Act is of general application, including hours of work in hotels in the province, and is admittedly prima facie within the jurisdiction of the provincial legislature under heads 10, 13 and 16 of s. 92. Only one real ground has been advanced for taking the Empress Hotel out of the Hours of Work Act, which applies to all other hotels in the province, namely, that it is owned and managed by the Canadian Pacific Railway Company. It is a novel idea that ownership should determine the legislative jurisdiction of the province with respect to it. On the interpretation of head 10 (*a*) of s. 92 hotels, divorced from railways, cannot possibly come under the words " other works and undertakings " connecting the province," etc., which would be things reasonably necessary to get goods and passengers along the railway to a point outside the province. Applying that test, these hotels are necessarily excluded from the exception. This restricted meaning has been adopted by the courts in many cases, e.g., the *Notre Dame de Bonsecours* case (1), *British Columbia Electric Ry. Co.* v. *Vancouver, Victoria and Eastern Railway and Navigation Co. and City of Vancouver* (2), the dissenting judgment of Duff J. in that case being subsequently affirmed by the Privy Council (3), *In re Alberta Railway Act* (4) and *Montreal Trust Co.* v. *Canadian National Ry. Co.* (5). Reliance is placed on the last cited case as conclusive against the argument for the appellant that " property real or personal and works connected therewith " in the definition of " railway " in s. 2 (21) of the Railway Act, 1927, includes the Empress Hotel. The appellant company is operating this hotel qua hotel and not qua railway. With regard to head 10 (*c*) of s. 92, it is submitted that s. 6 (*c*) of the Railway Act, 1927, is not an effective declaration under 10 (*c*) for the following reasons: first, 10 (*c*) is ineffective and meaningless because the works are already covered by 10 (*a*); secondly, it has been held that a declaration under 10 (*c*) must

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(1) [1899] A. C. 367.

(2) (1913) 48 S. C. R. (Can.) 98, 119.

(3) [1914] A. C. 1067, 1074.

(4) 48 S. C. R. (Can.) 9, 39.

(5) [1939] A. C. 613, 625.

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be in relation to a work wholly situate within the province and that the subject-matter must be either a specified existing work or one in contemplation before the declaration can be effective : *Reference re Waters and Water-powers* (1) ; *Luscar Collieries Ld.* v. *N. S. McDonald* (2). The test is not what the appellant company is empowered to do under its charter—the Act of 1902—but whether the subject-matter in question is one assigned to the province or the Dominion, and applying the well-known test as to pith and substance, true nature and character, the Hours of Work Act must necessarily fall within s. 92 (10), (13) or (16) : *In re Insurance Act of Canada* (3) ; *Lymburn* v. *Mayland* (4).

A. M. Nicol K.C. for the Attorney-General for Saskatchewan, intervener. Legislative jurisdiction as to the limiting of hours of work in industrial undertakings is primarily vested in the province under heads 13 and 16 of s. 92 and is not within Dominion jurisdiction : *Grand Trunk Railway of Canada* v. *Attorney-General for Canada* (5) ; *In re Alberta Railway Act* (6) ; *In re Legislative Jurisdiction over Hours of Labour* (7) and *Canadian National Railway and Others* v. *Attorney-General for Saskatchewan* (8). The Empress Hotel is not a railway or an integral or essential part thereof, or a work and undertaking falling within the legislative jurisdiction of the Dominion under head 10 (*a*) of s. 92. Neither does it come within Dominion jurisdiction under 10 (*c*) of s. 92 as it has not been declared by the Parliament to be a work for the general advantage of Canada or for the advantage of two or more of the provinces. [Reference was made to *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (9). *Ladore* v. *Bennett* (10), *Reference as the Validity of s. 31 of the Municipal District Act Amendment Act,* 1941, *Alberta Statute, c.* 53, *and as to the Operation thereof* (11) and *Attorney-General for Saskatchewan* v. *Attorney-General for Canada* (12).] Section 27A of the Canadian National-Canadian Pacific Act, 1933, purports to regulate labour relations and matters of property and civil rights between the company and its hotel employees and is therefore ultra vires the Parliament of Canada.

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(1) [1929] S. C. R. (Can.) 200, 219–20.

(2) [1925] S. C. R. (Can.) 460, 471–83.

(3) [1932] A. C. 41, 45.

(4) [1932] A. C. 318, 324.

(5) [1907] A. C. 65, 68.

(6) 48 S. C. R. (Can.) 9, 38.

(7) [1925] S. C. R. (Can.) 505.

(8) [1948] 1 D. L. R. 580, 585.

(9) [1920] A. C. 184.

(10) [1939] A. C. 468, 482.

(11) [1943] S. C. R. (Can.) 295.

(12) [1949] A. C. 110.

J. W. de B. Farris K.C., *H. Alan Maclean* and *John L. Farris* for the Attorney-General for Ontario, intervener, adopted the case for the respondent.

C. F. H. Carson K.C. replied. It was said that the Dominion only had jurisdiction under the opening words of s. 91 where there was something in the nature of an emergency, but it is stated in the *John Deere Plow Co.* case (1) that " the expression " ' civil rights in the province ' is a very wide one, extending, " if interpreted literally, to much of the field of the other " rights of s. 92 and also to much of the field of s. 91." With regard to head 10 (*a*) of s. 92, the question is what is the genuine purpose for which the hotel was provided, and if it was to provide refreshment, comfort and convenience for the travelling public then without doubt this hotel was plainly an integral part of the railway. It was built as part of the railway and steamship business and is being operated to-day for that purpose. The general principle applicable where there is a conflict of jurisdiction was stated in *Attorney-General for Alberta* v. *Attorney-General for Canada* (2), and applying that here the provincial legislation would not be applicable to the Empress Hotel. The regulation of hours of work would be within the exclusive legislative jursidiction of the Dominion. Section 27A is plainly valid Dominion legislation.

Nov. 21. The judgment of their Lordships was delivered by LORD REID, who stated the facts and statutory provisions set out above and continued: The inter-relation of ss. 91 and 92 has frequently been the subject of litigation and certain principles have emerged which their Lordships think it well to recall in view of the nature of the arguments submitted for the appellant in this case. Three matters are dealt with in ss. 91 and 92: first, the general power to make laws for the peace, order, and good government of Canada conferred on the Parliament of Canada by the first part of s. 91; secondly, the classes of subjects enumerated in the latter part of s. 91 as being within the exclusive legislative authority of the Parliament of Canada; and thirdly, the classes of subjects enumerated in s. 92 as being within the exclusive legislative authority of the provincial legislatures. The following propositions were stated in the judgment of their Lordships, delivered by Lord Tomlin, in *Attorney-*

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(1) [1915] A. C. 330, 340.

(2) [1943] A. C. 356, 370.

General for Canada v. *Attorney-General for British Columbia* (1) and were approved in *In re The Regulation and Control of Aeronautics in Canada* (2) and *In re Silver Brothers Ld.* (3) :—

"(1) The legislation of the Parliament of the Dominion, "so long as it strictly relates to subjects of legislation "expressly enumerated in s. 91, is of paramount authority, "even though it trenches upon matters assigned to the "provincial legislatures by s. 92 : see *Tennant* v. *Union* "*Bank of Canada* (4).

"(2) The general power of legislation conferred upon the "Parliament of the Dominion by s. 91 of the Act in supple- "ment of the power to legislate upon the subjects expressly "enumerated must be strictly confined to such matters "as are unquestionably of national interest and importance, "and must not trench on any of the subjects enumerated "in s. 92 as within the scope of provincial legislation, unless "these matters have attained such dimensions as to affect "the body politic of the Dominion : see *Attorney-General* "*for Ontario* v. *Attorney-General for the Dominion* (5).

"(3) It is within the competence of the Dominion Parlia- "ment to provide for matters which, though otherwise "within the legislative competence of the provincial legisla- "ture, are necessarily incidental to effective legislation by "the Parliament of the Dominion upon a subject of legisla- "tion expressly enumerated in s. 91 : see *Attorney-General* "*of Ontario* v. *Attorney-General for the Dominion* (6) ; and "*Attorney-General for Ontario* v. *Attorney-General for the* "*Dominion* (5).

"(4) There can be a domain in which provincial and "Dominion legislation may overlap, in which case neither "legislation will be ultra vires if the field is clear, but if the "field is not clear and the two legislations meet the "Dominion legislation must prevail : see *Grand Trunk* "*Ry. of Canada* v. *Attorney-General of Canada* (7)."

The appellant in this case relies on the last part of the second of the above propositions and on the following passage in the judgment delivered by Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (8) which is there referred to.

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(1) [1930] A. C. 111, 118.
(2) [1932] A. C. 54.
(3) [1932] A. C. 514.
(4) [1894] A. C. 31.
(5) [1896] A. C. 348.
(6) [1894] A. C. 189.
(7) [1907] A. C. 65.
(8) [1896] A. C. 348, 361.

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"Their Lordships do not doubt that some matters, in "their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and "to justify the Canadian Parliament in passing laws for "their regulation or abolition in the interest of the Dominion. "But great caution must be observed in distinguishing "between that which is local and provincial, and therefore "within the jurisdiction of the provincial legislatures, and "that which has ceased to be merely local or provincial, "and has become matter of national concern, in such sense "as to bring it within the jurisdiction of the Parliament of "Canada."

The first argument submitted for the appellant sought to bring this case within the class of case last referred to. The appellant's argument may be stated in this way: The appellant has a transportation system which is one integrated system including ocean marine services; main and branch lines owned or operated by the appellant; services of passenger and goods trains; inland and coastal steamship services; airplane and telegraph services; stations with refreshment, lavatory and other amenities; a chain of transcontinental hotels, goods depots, wharfs, warehouses, grain elevators and other activities. This unified system is a national undertaking which cannot reasonably be viewed as a conglomeration of local works and undertakings. The Empress Hotel, as the material in the record shows, is an integral part of this unified system. Properly viewed as a unified system, the appellant's undertaking and the works comprised therein, including its hotels, do not come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by s. 92 assigned exclusively to the legislatures of the provinces. Accordingly, the appellant's whole system, including its hotels, is within the legislative authority of the Parliament of Canada under its authority to make laws in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. The appellant does not deny that regulation of hours of work is ordinarily a matter of property and civil rights which falls under head 13 of s. 92. The basis of this argument must be that the Canadian Pacific Railway Company's activities have become such an extensive and important element in the national economy of Canada that the Canadian Parliament is now entitled under the general powers conferred by the first part of s. 91 to regulate all the affairs of that company, even where this involves legislating in relation to matters exclusively reserved to the provincial legislatures by s. 92.

There are many companies beside the appellant whose businesses extend over all, or most of, the provinces. It was not, and could not be, suggested that the Parliament of Canada could regulate the hours of work of employees of all such companies. The argument must be that, while the activities of those other companies, or most of them, in relation to the subjects enumerated in s. 92 remain of such a local or private nature that provincial legislatures retain the exclusive right to legislate in relation to them, the activities of the appellant in relation to those subjects are so different that s. 92 no longer applies to them. This is a novel argument in relation to transcontinental railways. Many cases have been litigated in which this argument would have been relevant. Many of these cases were of the greatest importance and several have come before this Board. It is not suggested that any new circumstances have emerged which would make this argument more appropriate in this case than in certain of the earlier cases, and it is very late in the day to bring forward an argument of this character. Nevertheless, their Lordships will deal with it.

The British North America Act is not silent on the subject of railways and railway undertakings: s. 92, head 10, read in conjunction with s. 91, head 29, lays down with regard to this subject what shall be within the competence of provincial legislatures and what within the competence of the Parliament of Canada. Their Lordships will have to give close examination to this matter in dealing with the next argument for the appellant. If the appellant were to succeed in that argument the argument now under examination would be unnecessary. The present argument is that, even if the line of division laid down in the Act leaves the regulation of the hours of work of the employees with whom this case is concerned within the exclusive competence of the provincial legislature, yet there are overriding considerations arising from the position of the appellant which make that line of division inapplicable to this case. The appellant claims that its undertaking is not of a local or private nature. Let it be admitted for the purpose of this argument that that is so. But in dealing with this general question the position of the employees affected and of those

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who use the hotel is not irrelevant. From the point of view of an employee who resides in British Columbia, the regulation of his hours of work is as much a matter of civil right in the province whether he is employed by the appellant or by some other corporation. It is true that many matters which from one aspect are local and fall within the scope of s. 92 are nevertheless withdrawn from the competence of the provincial legislature, but that is by virtue of the terms of the last sentence of s. 91. That provision makes it clear that a matter which is truly one of civil rights in the province will be withdrawn from the provincial legislature and come within the competence of the Parliament of Canada if it comes within, or is necessarily incidental to, any of the subjects enumerated in s. 91 or expressly excepted from s. 92. But their Lordships can find neither principle nor authority to support the competence of the Parliament of Canada to legislate on a matter which clearly falls within the enumerated heads in s. 92 and cannot be brought within any of the enumerated heads in s. 91 merely because the activities of one of the parties concerned in the matter have created a unified system which is widespread and important in the Dominion. " It is interesting to notice how " often the words used by Lord Watson in *Attorney-General* " *for Ontario* v. *Attorney-General for the Dominion* (1) have " unsuccessfully been used in attempts to support encroach- " ments on the provincial legislative powers given by s. 92. " They laid down no principle of constitutional law, and were " cautious words intended to safeguard possible eventualities " which no one at the time had any interest or desire to define " (*Attorney-General for Canada* v. *Attorney-General for Ontario* (2)). In their Lordships' judgment the present case is very different from any of those exceptional cases to which the words used by Lord Watson are applicable. It must be borne in mind that the passage quoted above from the judgment delivered by Lord Watson follows on, and must be read together with, the following passage in the same judgment :—

" The general authority given to the Canadian Parliament " by the introductory enactments of s. 91 is ' to make laws " ' for the peace, order, and good government of Canada, " ' in relation to all matters not coming within the classes " ' of subjects by this Act assigned exclusively to the legisla- " ' tures of the provinces ' ; and it is declared, but not so " as to restrict the generality of these words, that the

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(1) [1896] A. C. 348.

(2) [1937] A. C. 326, 353.

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"exclusive authority of the Canadian Parliament extends "to all matters coming within the classes of subjects which "are enumerated in the clause. There may, therefore, be "matters not included in the enumeration, upon which "the parliament of Canada has power to legislate, because "they concern the peace, order, and good government of "the Dominion. But to those matters which are not "specified among the enumerated subjects of legislation, "the exception from s. 92, which is enacted by the con-"cluding words of s. 91, has no application; and, in legis-"lating with regard to such matters, the Dominion "Parliament has no authority to encroach upon any class "of subjects which is exclusively assigned to provincial "legislatures by s. 92. These enactments appear to their "Lordships to indicate that the exercise of legislative "power by the Parliament of Canada, in regard to all "matters not enumerated in s. 91, ought to be strictly "confined to such matters as are unquestionably of Canadian "interest and importance, and ought not to trench upon "provincial legislation with respect to any of the classes "of subjects enumerated in s. 92. To attach any other "construction to the general power which, in supplement "of its enumerated powers, is conferred upon the Parliament "of Canada by s. 91, would, in their Lordships' opinion, "not only be contrary to the intendment of the Act, but "would practically destroy the autonomy of the provinces. "If it were once conceded that the Parliament of Canada "has authority to make laws applicable to the whole "Dominion, in relation to matters which in each province "are substantially of local or private interest, upon the "assumption that these matters also concern the peace, "order, and good government of the Dominion, there is "hardly a subject enumerated in s. 92 upon which it might "not legislate, to the exculusion of the provincial "legislatures" (1).

In their Lordships' judgment these principles apply to the present case and they therefore do not accept the first argument for the appellant.

The second argument submitted for the appellant was on more familiar lines depending on the construction of head 10 (*a*) of s. 92. Head 29 of s. 91 brings within the legislative

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(1) [1896] A. C. 360–1.

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authority of the Parliament of Canada any matter expressly excepted in the enumeration of classes of subjects in s. 92; and, as paragraphs (*a*), (*b*) and (*c*) of head 10 of s. 92 are exceptions from that head, it follows that if the Empress Hotel can be brought within the scope of any of these paragraphs it must come within the scope of s. 91. If the Hotel could be shown to be within the scope of s. 91 that would open the way for an argument that regulation of the hours of work of those who work in it must also be within the scope of that section and therefore a matter within the legislative authority of the Parliament of Canada. Paragraph (*b*) of head 10 is not relevant in this case, but the appellant founded on both paragraphs (*a*) and (*c*). The arguments founded on these paragraphs are different and it will be convenient to deal with them separately.

Head 10 (*a*) begins by specifying four classes, "Lines of "steam or other ships, railways, canals, telegraphs," it then adds another class "and other works and undertakings," and then concludes with qualifying words, "connecting the "province with any other or others of the provinces, or extending beyond the limits of the province." Their Lordships have no doubt that these qualifying words apply not only to the words which immediately precede them—"other works "and undertakings"—but also to each of the four classes specified at the beginning of the paragraph. A more difficult question is the scope which should be attributed to the words "lines of" at the beginning of the paragraph: must it be held that the four specified classes are lines of steam and other ships, lines of railways, lines of canals, and lines of telegraphs; or do the words "lines of" only apply to "steam and other "ships" so that the other specified classes are not lines of railways, etc., but are simply railways, canals, and telegraphs? In their Lordships' judgment the latter construction is correct. The context shows that each of the four specified classes is intended to be a class of "works and undertakings." Head 10 begins by referring to local works and undertakings, and the phrase which follows the four specified classes is "other works "and undertakings." The latter part of the paragraph makes it clear that the object of the paragraph is to deal with means of inter-provincial communication. Such communication can be provided by organizations or undertakings, but not by inanimate things alone. For this object the phrase "lines of ships" is appropriate: that phrase is commonly used to denote not only the ships concerned but also the organization which makes them regularly available between certain points. But the phrase " lines of railways " would not normally have a similar meaning: it would refer rather to railway tracks and those things which are necessarily incidental to their use and would not be appropriate to denote the undertaking which provides regular travelling facilities. In their Lordships' view the structure of the paragraph does not require that the words " lines of " shall be held to qualify the word " railways " ; and to read in those words would tend to defeat the purpose of the paragraph and would introduce a difficult and, perhaps, unworkable distinction between those parts of a railway undertaking which could properly be denoted by the term " lines of railways " and would therefore be within the legislative authority of the Parliament of Canada, and those parts of the undertaking which could not be so regarded.

The question for decision, therefore, is, in their Lordships' view, whether the Empress Hotel is a part of the appellant's railway works and undertaking connecting the province of British Columbia with other provinces or is a separate undertaking. A company may be authorized to carry on, and may in fact carry on, more than one undertaking. Because a company is a railway company it does not follow that all its works must be railway works or that all its activities must relate to its railway undertaking. By the Canadian Pacific Railway Act, 1902, the appellant was authorized to build and operate hotels (s. 8), to engage in mining and other activities (s. 9), to construct and operate electric generating stations (s. 10) and to exercise the powers of an irrigation company (s. 11). The powers conferred by s. 9 were expressed to be for the purpose of enabling the appellant to utilize its land grant. It was held in *Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (1) that subsidy lands were not held by the company as part of its railway or of its undertaking as a railway company and were not withdrawn from the legislative authority of the provincial legislature: and it could hardly be suggested that buildings erected on such lands for the purpose of carrying on mining or other activities authorized by s. 9 of the appellant's Act are works coming within the scope of head 10 (*a*) of s. 92. In the case of other works or other activities it may be difficult to determine whether or not they are part of the company's railway works and undertaking, and the question may depend both on the terms of the section authorizing them and on the facts of the case. Section 8 of the appellant's Act of 1902 is in the following terms : " The Company may, for the purposes " of its railway and steamships and in connexion with its " business, build, purchase, acquire or lease for hotels and " restaurants, such buildings as it deems advisable and at such " points or places along any of its lines of railway and lines " operated by it or at points or places of call of any of its " steamships, and may purchase, lease and hold the land " necessary for such purposes, and may carry on business in " connexion therewith for the comfort and convenience of the " travelling public, and may lay out and manage parks and " pleasure grounds upon the property of the Company and " lease the same from or give a lease thereof to any person, " or contract with any person for their use, on such terms as " the Company deems expedient."

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(1) [1922] 1 A. C. 202.

This section limits the places where the appellant may build or operate hotels, but it does not limit the classes of hotel business which may be carried on therein. Their Lordships do not read the authority to carry on business " for the comfort " and convenience of the travelling public " as requiring the appellant to cater exclusively or specially for those who are travelling on its system. The appellant is free to enter into competition with other hotel keepers for general hotel business. It appears from the facts stated in the order of reference that the appellant has so interpreted its powers and that in the Empress Hotel it does carry on general hotel business. It may be that, if the appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be a part of its railway undertaking. Their Lordships do not doubt that the provision of meals and rest for travellers on the appellant's system may be a part of its railway undertaking whether that provision is made in trains or at stations, and such provision might be made in a hotel. But the Empress Hotel differs markedly from such a hotel. Indeed, there is little, if anything, in the facts stated to distinguish it from an independently owned hotel in a similar position. No doubt the fact that there is a large and well-managed hotel at Victoria tends to increase the traffic on the appellant's system ; it may be that the appellant's railway business and hotel business help each other, but that does not prevent them from being separate businesses or undertakings.

In dissenting from the judgment of the Court of Appeal in this case, O'Halloran J.A. said: " But the undertaking of the " Canadian Pacific Railway Company is one single undertaking " and is not a collection of separate and distinct businesses." His view was that because the hotel provides for the comfort and convenience of travellers it is an integral link in the appellant's transportation system, and that, as the other business done by the hotel cannot be severed from services to the appellant's passengers, the whole must be within the railway undertaking. For the reasons already given their Lordships are unable to agree with this view. In *Canadian Pacific Railway Company and Canadian Pacific Express Co.* v. *Attorney-General for Saskatchewan* (1) one of the questions decided by the Court of Appeal for Saskatchewan was that the Hours of Work Act of that province did not apply to employees in the appellant's hotels in that province. MacDonald J.A., in delivering the judgment of the court, adopted the reasoning of O'Halloran J.A. to which reference has already been made and held that the hotels formed an adjunct of the appellant's " works and undertakings." If by that the learned judge meant that they formed a part of the railway undertaking then their Lordships are unable to reach that conclusion with regard to the Empress Hotel: but, if it was meant that the hotels, though not forming a part of the railway undertaking, were of service to it, then that, in their Lordships' view, is not enough to bring them within the scope of the exceptions to head 10 of s. 92.

Their Lordships were referred to a definition of " Pacific " Railways " in an Act of the Parliament of Canada (Statutes of Canada 1932-33 (23 & 24 Geo. V c. 33)) where the appellant's hotel system was specifically included in that definition. But that Act was passed for a particular purpose, and in any event that definition cannot affect the meaning of the word " railways " in the British North America Act, 1867. Their Lordships would add that if this hotel, or the appellant's chain of hotels, is regarded as separate from its railway undertaking, then those hotels cannot come under the words " other works " and undertakings connecting with the province with any " other or others of the provinces, or extending beyond the " limits of the province " because the hotels considered separately from the railway system do not connect one province with another. Their Lordships therefore hold that the

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(1) [1947] 2 W. W. R. 909.

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Empress Hotel does not come within the scope of head 10 (*a*) of s. 92.

The third argument submitted for the appellant sought to bring the Empress Hotel within the scope of head 10 (*c*) of s. 92. If this argument is to succeed it is necessary to find that the hotel, or something which includes the hotel, has been declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of its provinces. There is no declaration by the Parliament of Canada which specifically mentions either this hotel or the appellant's hotels generally; but it is contended for the appellant that the declaration contained in s. 6 (*c*) of the Railway Act, 1927 (Statute of Canada 1927 c. 170) is wide enough to embrace the appellant's hotels, including the Empress Hotel. This was not the first declaration by the Parliament of Canada with regard to railways. In an Act of 1883 (46 Vict. c. 24) amending the Consolidated Railway Act, 1879, it was declared in s. 6 that certain specified lines of railway, including the Canadian Pacific Railway, are works for the general advantage of Canada, and that every branch line or railway then or thereafter connecting with or crossing any of the specified lines of railway is a work for the general advantage of Canada. Declarations in substantially the same terms were contained in the Railway Act, 1886, s. 121, and the Railway Act, 1888, s. 306. It would be difficult to maintain that these declaratons included anything beyond strictly railway works; but that question need not be further considered because in 1919 a wider form of declaration was enacted, and this form of declaration was repeated in 1927 and is still in force. In both the Railway Act, 1919, and the Railway Act, 1927, s. 6 (*c*) is in the following terms:—

"The provisions of this Act shall, without limiting the "effect of the last preceding section, extend and apply to:—

* * * * *

"(*c*) every railway or portion thereof, whether constructed "under the authority of the Parliament of Canada or not, "now or hereafter owned, controlled, leased, or operated "by a company wholly or partly within the legislative "authority of the Parliament of Canada, or by a company "operating a railway wholly or partly within the legislative "authority of the Parliament of Canada, whether such "ownership, control or first mentioned operation is acquired "or exercised by purchase, lease, agreement or other means "whatsoever, and whether acquired or exercised under "authority of the Parliament of Canada, or of the legislature "of any province, or otherwise howsoever; and every "railway or portion thereof, now or hereafter so owned, "controlled, leased or operated shall be deemed and is "hereby declared to be a work for the general advantage "of Canada."

In both the Railway Act, 1919, and the Railway Act, 1927, s. 2 (21) provides that unless the context otherwise requires "'railway' means any railway which the company has "authority to construct or operate, and includes all branches, "extensions, sidings, stations, depots, wharves, rolling stock, "equipment, stores, property real or personal and works "connected therewith, and also any railway bridge, tunnel "or other structure which the company is authorized to "construct; and, except where the context is inapplicable, "includes street railway and tramway."

It was argued that the Empress Hotel falls within the scope of this definition of railway and therefore within the scope of the declaration in s. 6 (*c*). In their Lordships' judgment that is not so. The fact that it was thought necessary to specify such things as sidings, stations, railway bridges and tunnels as being included in the definition of "railway" indicates that the word "railway" by itself cannot have been intended to have a very wide signification; and in their Lordships' view there is nothing in the definition to indicate that it was intended to include anything which is not a part of, or used in connexion with the operation of, a railway system. The appellant founded on two general phrases which occur in the definition—"property real or personal and works "connected therewith" and "other structure which the company "is authorized to construct." With regard to the first of these phrases their Lordships are of opinion that the words "connected therewith" qualify the whole phrase and refer back to the preceding words, and therefore property which is not connected with the railway system is not included: with regard to the second phrase, the context shows that these words were not intended to bring in structures which have no connexion with a railway system merely because a railway company was authorized to construct them. The appellant is authorized by the Canadian Pacific Railway Act, 1902, to carry on a variety of undertakings, including mining, electricity supply and irrigation: it cannot have been intended that structures erected solely for the purposes of these undertakings and having no connexion with the railway system should be included within this definition of "railway." Accordingly, the Empress Hotel could only come within the scope of the definition if it could be regarded as connected with the appellant's railway system or railway undertaking. Their Lordships have already held that that hotel is not part of the appellant's railway or railway works and undertaking within the meaning of s. 92 (10) of the British North America Act, 1867; for similar reasons they hold that it does not come within the scope of the declaration enacted by the Parliament of Canada in s. 6 (*c*) of the Railway Act, 1927. It is therefore unnecessary for their Lordships to consider the argument that this declaration is not a valid declaration. In *Luscar Collieries* v. *McDonald* (1) their Lordships stated that they wished it "distinctly to be "understood that so far as they are concerned the question "as to the validity of s. 6 (*c*) of the Act of 1919 is to be treated "as absolutely open." Section 6 (*c*) of the Act of 1927 is in the same terms, and the question of its validity remains absolutely open so far as their Lordships are concerned.

It is also unnecessary for their Lordships to express any opinion on the question whether, if the Empress Hotel could be brought within the scope of either head 10 (*a*) or head 10 (*c*) of s. 92 of the British North America Act, 1867, regulation of the hours of work of persons employed in it would be either within the exclusive legislative authority of the Parliament of Canada or within the domain in which provincial and Dominion legislation may overlap. As their Lordships hold that the general power conferred on the Parliament of Canada by the first part of s. 91 does not apply in this case and that this hotel does not come within the scope of either head 10 (*a*) or head 10 (*c*) of s. 92 it follows that regulation of the hours of work of those employed in this hotel is within the exclusive legislative authority of the legislature of the province of British Columbia and that the question in the order of reference was rightly answered in the affirmative by the Canadian courts.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the parties have agreed that there should be no costs of the appeal their Lordships make no order as to costs.

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(1) [1927] A. C. 925, 933.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondent, and for the Attorney-General for Ontario, intervener: *Gard, Lyell & Co.*

Solicitors for the Attorney-General for Canada, intervener: *Charles Russell & Co.*

Solicitors for the Attorneys-General for Saskatchewan and Alberta, interveners: *Lawrence Jones & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
1949
Oct. 18, 19; *Dec.* 14.

INLAND REVENUE COMMISSIONERS . APPELLANTS;
AND
JOHN DOW STUART LD. . . . RESPONDENT.

Revenue—Income tax—Excess profits tax—Deficiencies following excesses—Excess profits tax assessed but not paid before deficiencies occur—Proper deductions for income-tax purposes—Finance (*No.* 2) *Act,* 1939 (2 & 3 *Geo.* 6, *c.* 109), *ss.* 15, 18.

By the Finance (No. 2) Act, 1939, s. 12, sub-s. 1: "Where the "profits arising in any chargeable accounting period from any "trade or business to which this section applies exceed the standard "profits, there shall, subject to the provisions of this Part of this "Act, be charged on the excess a tax (to be called the excess "profits tax) equal to three-fifths of the excess." (By s. 26, sub-s. 1, of the Finance Act, 1940, the tax was to be "equal to "the excess.")

By s. 15: "(1.) For the purposes of this Part of this Act a "deficiency of profits shall be deemed to have occurred in a trade "or business in any chargeable accounting period if the profits "arising from the trade or business in that period are less than "the standard profits, or if a loss is sustained in the trade or "business in that period; and the amount of the deficiency

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**Present:* LORD PORTER, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT and LORD REID.

"occurring in any such period shall be taken to be (*a*) where "profits have been made in the period, the amount by which "those profits fall short of the standard profits; (*b*) Where a loss "has been sustained in the period, the amount of the loss added "to the amount of the standard profits. (2.) Where a deficiency "of profits occurs in any chargeable accounting period in any "trade or business, the profits chargeable with excess profits "tax arising from the trade or business shall be deemed to be "reduced, and relief shall be granted in accordance with the "following provisions: (*a*) the aggregate amount of the profits "so chargeable for the previous chargeable accounting periods "shall be deemed to be reduced by the amount of the deficiency, "and the amount of excess profits tax payable in respect thereof "shall be deemed to be reduced accordingly, and the relief "necessary to give effect to the reduction shall be given by "repayment or otherwise; (*b*) where the amount of the deficiency "exceeds the aggregate amount of the profits so chargeable for "the previous chargeable accounting periods, the balance of the "deficiency shall be applied in reducing any profits so chargeable "for the next subsequent chargeable accounting period, and, "if and so far as it exceeds the amount of those profits, any "profits so chargeable for the next subsequent chargeable "accounting period, and so on."

By s. 18: "(1.) The amount of the excess profits tax payable "in respect of a trade or business for any chargeable accounting "period shall, in computing for the purposes of income tax the "profits and gains arising from the trade or business, be allowed "to be deducted as an expense incurred in that period: Provided "that where under the provisions of this Act relating to "deficiencies of profits, relief is given by way of repayment from "excess profits tax chargeable for any chargeable accounting "period previous to that in which the deficiency occurs, the "amount of the deduction allowed under this section shall not be "altered but the amount repayable shall be taken into account "in computing the profits and gains of the trade or business "for the purposes of income tax as if it were a profit of the trade "or business accruing in the chargeable accounting period in "which the deficiency occurs. (2.) The provisions of this section "do not apply to the computation of the profits of a trade or "business for the purposes of the national defence contribution."

By s. 21, sub-s. 1: "Excess profits tax shall be assessed and "collected by the Commissioners, and shall be due and payable "at the expiration of one month from the date of assessment, "and shall be recoverable as a debt due to His Majesty from the "person on whom it is assessed."

A company having, in three successive years, earned profits attracting excess profits tax, suffered, in the two subsequent years, deficiencies of profits entitling it to relief from the tax. The company had in fact made only one small payment on account of the tax, and part of this ultimately became repayable under the relieving provisions of the Act. Questions arose as to the method by which the profits of the company should be computed for the purposes of income tax.

Held (*per* Lord Porter, Lord Normand, Lord MacDermott and Lord Reid, Lord Morton of Henryton dissenting), that, for the purpose of finding the amount of excess profits tax payable in any chargeable accounting period and allowable as a deduction in computing profits for the purposes of income tax in accordance with s. 18 of the Act, each chargeable accounting period must be treated separately, and that therefore, in each of the first three accounting periods, the company might deduct the full amount of excess profits tax payable, even though it had not in fact been paid.

Held, further (*per* Lord Porter, Lord Normand and Lord Reid, Lord Morton of Henryton and Lord MacDermott dissenting) that, in each of the two subsequent chargeable accounting periods in which a deficiency of profits occurred, in computing the company's profits for income-tax purposes, the amount of excess profits tax in respect of which relief was given under s. 15 was to be attributed as a profit to that period by virtue of the proviso to s. 18, sub-s. 1.

Decision of the First Division of the Court of Session, 1948 S. C. 686, affirmed.

APPEAL from the First Division of the Court of Session.

The facts, stated by LORD MORTON OF HENRYTON, were as follows: The respondents, a limited company carrying on business in Scotland as building contractors, were assessed to income tax under sch. D of the Income Tax Act, 1918, for the years 1941–42 to 1945–46 inclusive, as follows:—

1941–42 on the sum of 2,338*l*. less wear and tear 80*l*.
1942–43 on the sum of 5,000*l*.
1943–44 on the sum of 5,000*l*.
1944–45 on the sum of 500*l*.
1945–46 on the sum of 500*l*.

The respondents appealed against these assessments, and their appeal was heard by the General Commissioners of income tax for the Lower Ward of Lanarkshire on February 3, 1947. It was then stated to the Commissioners that on September 13, 1946, the parties had finally agreed to the figures of profits and of excess profits tax for all chargeable accounting periods up to that ending on July 31, 1944. The net balance of excess profits tax payable on an accounting in respect of all the chargeable accounting periods up to and including the twelve months ending July 31, 1944, had been agreed to be 517*l*.

The details of the finally agreed computations were as follows:

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Chargeable accounting period.	Excess profits tax payable.	Amounts repayable or to be set off in respect of excess profits tax deficiencies.
4 months to July 31, 1939		£97 16 0 (Set off against excess for twelve months to July 31, 1940)
12 months to July 31, 1940	£3,548 (after allowance of deficiency of £97 16*s*. for the period of four months to July 31, 1939)	
12 months to July 31, 1941	£1,384	
12 months to July 31, 1942	£4,636	
12 months to July 31, 1943		£8,465
12 months to July 31, 1944		£586
	£9,568	£9,051
Deduct deficiencies ..	£9,051	
Net balance of excess profits tax payable	£517	

The respondents had paid 1,000*l*. in September, 1943, as a payment on account of excess profits tax and the appellants had credited this sum against the assessment for the year to July 31, 1940. In the year 1946 the appellants, after satisfying the net balance of excess profits tax payable of 517*l*. repaid the balance of 483*l*. to the respondents.

The amounts of the profits chargeable to income tax before making adjustments in respect of excess profits tax payable and repayable were also agreed by both parties in the following amounts :—

Year to July 31, 1940 ..	Profit, £4,838
Year to July 31, 1941 ..	Profit, £2,456 Interest, £21
Year to July 31, 1942 ..	Profit, £5,783
Year to July 31, 1943 ..	Loss, £7,645
Year to July 31, 1944 ..	Profit, £550

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The parties, however, did not agree the adjustments to be made for income-tax purposes in respect of the excess profits tax liabilities payable and the amounts of excess profits tax repayable for deficiencies.

The contest between the parties as to the construction and effect of the relevant sections was conveniently illustrated by certain tables put before the Commissioners and relied upon before the House of Lords.

Table A showed the respondents' computation, and was as follows :—

A. *The Company's Computation.*

			Net profit for income tax
Year to July 31, 1940	Agreed profit	£4,838	
	Less excess profits tax payable as finally agreed	£3,548	
			£1,290
Year to July 31, 1941	Agreed profit	£2,456	
	Interest	21	
	Less excess profits tax payable as finally agreed	£1,384	
			£1,093
Year to July 31, 1942	Agreed profit	£5,783	
	Less excess profits tax payable as finally agreed	£4,636	
			£1,147
Year to July 31, 1943	Agreed loss	£7,645	
	Credit for excess profits tax repayable as finally agreed	£8,465	
			£820
Year to July 31, 1944	Agreed profit	£550	
	Credit for excess profits tax repayable as finally agreed	£586	
			£1,136

Table B was put in on behalf of the appellants, by the Inspector of Taxes who appeared before the General Commissioners, and was as follows :—

B. *The Inspector's Computation.*

			Net profit for income tax
Year to July 31, 1940	Agreed profit	£4,838	
	Less excess tax actually paid	£1,000	
			£3,838
Year to July 31, 1941	Agreed profit	£2,456	
	Interest	21	

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	Excess profits tax actually paid	Nil.	
			£2,477
Year to July 31, 1942	Agreed profit	£5,783	
	Excess profits tax actually paid	Nil	
			£5,783
Year to July 31, 1943	Agreed loss	£7,645	
	Excess profits tax actually paid	Nil	
			£7,645 (Loss)
Year to July 31, 1944	Agreed profit	£550	
	Add excess profits tax repaid	£483	
			£1,033

The General Commissioners accepted the respondents' computation as shown in Table A and their decision was affirmed on appeal by the First Division of the Court of Session as the Court of Exchequer in Scotland on a case stated under s. 149 of the Income Tax Act, 1918. The appellants appealed to the House of Lords.

In the concluding paragraph of the case stated, the General Commissioners set out the question of law as follows: "The "question of law for the opinion of the court is whether we "adopted the correct method of dealing with excess profits "tax in arriving at the profits of the company for the purpose "of income tax."

Sir Frank Soskice S.-G., Johnston S.-G. for Scotland, Shewan K.C. (of the Scottish Bar) and *Reginald Hills* (of the English Bar) for the appellants. The method of computation of trading profits for income tax advanced by the respondents does not conform to the relevant statutory provisions, in particular to s. 18 of the Finance (No. 2) Act, 1939, and is unwarranted by law, whereas that contended for by the appellants is in accordance with the Act, properly interpreted, and with the principles of income-tax law. It is in conformity with the reality of the situation and with the company's actual profits. The question to be determined is as follows: when assessing a person to income tax and computing what he is to be allowed to deduct from his income-tax returns in respect of his excess profits tax liability, what is to be done in order to take account of subsequent deficiencies of profits? The excess profits tax liability can be treated as an income-tax expense. Under the specific terms of the relevant sections, if in, say, three years there are profits attracting excess profits tax but in the fourth year there is a deficiency, the profits chargeable to excess profits tax shall be deemed to be reduced and relief shall be given, the profits of each year in turn being reduced by the amount of the deficiency remaining unrelieved until the whole of the deficiency has been made up.

The current excess profits tax legislation should be contrasted with the Finance (No. 2) Act, 1915, s. 38, sub-s. 3, relating to relief from excess profits duty in the case of a subsequent deficiency of profits. The vital question concerns the meaning of the word " payable " in s. 18 of the Act of 1939. That section must be read in its context, i.e. the fasciculus of sections (Part III headed " Excess Profits Tax ") which lay down in what manner and to what extent this new temporary emergency tax is payable. In particular, it must be read in the light of s. 15. For the respondent company to succeed the sections must be read disjunctively and s. 18 must be read as if s. 15 did not exist; but it is obvious that, in expressing s. 18, the draughtsman had s. 15 in mind. By s. 15, sub-s. 2 (*a*) the profits " shall be deemed to be reduced by the amount of " the deficiency," which can be done only by also reducing to that extent the sums chargeable with excess profits tax in each chargeable accounting period; and it is this latter sum so reduced which is ultimately to be deducted from the total profits attributable to each accounting period. Therefore, if the result of reducing the sum chargeable with excess profits tax by the amount of the deficiencies is to reduce it to nothing, no excess profits tax is " payable " and so none is deductible under s. 18, sub-s. 1. It is the ultimate sum on which excess profits tax is payable which is deductible from the profits liable to pay income tax, and not the provisional sum reached by taking account of an individual year's working.

The phrase " the amount of excess profits tax payable " in s. 15, sub-s. 2, and s. 18, sub-s. 1, must mean the sum ultimately payable after the appropriate deduction for deficiency has been made. The view that the scheme of the Act is expressly directed to the chargeable accounting period and to the relationship between profits for income tax and liability for excess profits tax or relief therefrom in that period is at variance with s. 15 where, on the one hand, the occurrence of a deficiency is directly related to a specific period but, on the other hand, the consequential treatment of profits is related to the profits, not of that period alone, but over a series of periods. The amount payable under s. 18, sub-s. 1, must mean the greater of (*a*), the amount of excess profits tax ultimately payable in respect of a particular year as subsequently reduced by way of relief under s. 15 and (*b*) the amount of excess profits tax actually paid in respect of the same year. The prima facie meaning of the word "payable" is thus expanded and modified by s. 15 and the proviso to s. 18, sub-s. 1. The proviso is only applicable to a case where, and to the extent to which, actual payment and repayment have been made. If the excess profits tax had been paid in full by the respondents on the figures agreed before any deduction for later deficiencies, they could have claimed relief, the proviso would apply and the amount of the deduction already allowed could not be altered. Here, however, apart from 1,000*l.* paid, for which credit has been given, and the repayment of 483*l.* found to have been overpaid when the final liability was ascertained, no sum was paid or repaid in respect of excess profits tax.

In s. 18, sub-s. 1, "repayment" means strictly a cash payment. Where another meaning is intended another expression is used, as in s. 15, sub-s. 2 (*a*): "relief . . . . "shall be given by repayment or otherwise." Here the amount of the deduction originally allowed under the section is to be altered, and the ultimate amount of excess profits tax due after the relevant deductions for deficiencies have been made is alone to be taken from the profits; since in fact no excess profits tax was paid for the relevant accounting period, no sum is to be allowed to be deducted in arriving at the profits. The respondent company's calculation would be right if the amount of the excess profits tax had been paid or tendered. Then relief would have been given "by "way of repayment" under the proviso to s. 18, sub-s. 1, and the amount repayable would have been brought into a later year "as if it were a profit of the trade or business "accruing in" that year. In this case, however, relief is given "otherwise," viz., by set-off, and the respondent company's computation is wrong. It is admitted that the Crown's argument involves the situation that in such a case as this there is no certainty in the taxpayer's income-tax assessment till the end of the excess profits tax legislation. It is also conceded that, where tax has been paid, the fact that it has subsequently been repaid makes no difference.

for it is still deductible as an expense for income-tax purposes, despite its later return to the taxpayer. The word "payable" in s. 18, sub-s. 1 has different meanings according to what has actually been paid before the years when the deficiency occurs are taken into account under s. 15, sub-s. 2: (*a*) if the original assessment has been paid in full, it means payable under the assessment; (*b*) if nothing has been paid, it means ultimately found to be payable after subsequent deficiencies have been taken into account; (*c*) if, as in this case, part has been paid and part or all of that payment has been repaid, it means the amount actually paid, having no relation either to the amount payable under the assessment or the amount ultimately found to be payable. [They also referred to s. 19, sub-s. 3, and s. 21, sub-s. 1 of the Act of 1939, and to *Tarrant* v. *Roberts* (1).]

Morison K.C. (of the English Bar, K.C. of the Scottish Bar) and *Matheson* (of the Scottish Bar) for the respondent company. On the true construction of s. 18, sub-s. 1 of the Act of 1939, the respondent company's computation is correct. The only section in the Act of 1939 which bears on the relationship between excess profits tax and income tax, and their interaction, is s. 18. The question must be determined solely on the construction of that section, and there must not be introduced into the matter provisions of the Income Tax Act which do not form part of the excess profits tax code. No light is thrown on s. 18 by s. 15, sub-s. 2, which is directed only to giving the taxpayer relief by the deduction of any subsequent deficiency from the aggregate of the excess profits tax; it is not concerned with the amount of excess profits tax payable for any chargeable accounting period.

The respondent company's method of computation follows exactly the terms of s. 18, sub-s. 1, which in terms entitles them to deduct for the purposes of income tax the amount of the excess profits tax as adjusted for each chargeable accounting period as an expense incurred in that period. When a deficiency of excess profits tax occurred in any chargeable accounting period the amount repayable should be added as if it had been a profit accruing in the chargeable accounting period in which the deficiency occurred. Taking the first of the relevant chargeable accounting periods, 3,548*l.* was "the "amount of the excess profits tax payable in respect of"

(1) (1930) 47 T. L. R. 199; 15 Tax Cas. 754.

the business for that period under s. 18, sub-s. 1, and accordingly under the same sub-section it was deductible "as an "expense incurred in that period," because it was "payable" under s. 21, sub-s. 1. Throughout the whole of Part III of the Act the chargeable accounting period is emphasized as the unit of assessment, each period being treated separately; and once it is found what are the excess profits in respect of a particular period and what is the excess profits tax payable in respect of it, an allowable deduction has been reached and it cannot subsequently be disturbed. If there is a subsequent "deficiency of profits" within s. 15, sub-s. 1, the proviso to s. 18, sub-s. 1 comes into operation, and on that the respondent company relies, for it specifically enacts that "the amount of "the deduction allowed under this section shall not be altered." The words "where . . . . relief is given by way of repayment "from excess profits tax chargeable for any chargeable "accounting period" are not limited to the case of repayment in cash, but cover every case in which relief is given under s. 15, sub-s. 2 (*a*), including relief by set-off. Accordingly, in the present case "the amount repayable" within the proviso, which is to be brought into account as a profit in the deficiency year includes all the excess profits tax liability in respect of which relief has been granted, and is not limited to the actual repayment of 483*l*. The proviso is not limited in its application to tax which the taxpayer actually paid and which must now be repaid: it also applies to the further sum originally due which was not paid and which the taxpayer is not now obliged to pay because liability to pay it has been discharged by the operation of the relief. It is to be noted that s. 18, sub-s. 1 refers to "the amount of the excess profits tax *payable*," not "paid." It would be strange if the fact of payment or non-payment of the excess profits tax made a radical difference to the relief computation.

In the respondent company's computation the "excess "profits tax payable as finally agreed" was rightly deducted in each of the first three chargeable accounting periods; and when there was a deficiency of profits of 8,465*l*. in the fourth period, it was correct not to disturb the deduction already made in each of the first three periods. That deficiency was rightly taken into account under the proviso to s. 18, sub-s. 1, "as if it were a profit of the trade or "business accruing in the chargeable accounting period in "which the deficiency occurs." This also applies to the later deficiency of 586*l.* Accordingly, the computation is correct throughout and the three deductions of 3,548*l.*, 1,384*l.* and 4,636*l.* should be left unaffected by the subsequent deficiencies. It is conceded that this computation cannot be right if the true effect of s. 15, sub-s. 2 (*a*) is that the amount chargeable with excess profits tax is "deemed to be reduced" to nil. In that case the respondent company would agree that the 1,000*l.* and the 483*l.* should be allowed as deductions for the purposes of income tax as expenses in the two relevant periods, as shown in the appellants' computation. The respondent company's computation is, however, more in accordance with the income-tax outlook than that of the appellants. It is not in keeping with that outlook that the ascertainment of liability in respect of income tax should be postponed for an indefinite period.

Sir Frank Soskice S.-G. replied.

Their Lordships took time for consideration.

Dec. 14. LORD PORTER. My Lords, this is an appeal from a decision of the First Division of the Court of Session upon a case stated under s. 149 of the Income Tax Act, 1918. It is concerned with the proper method of ascertaining what the liability to income tax is where there has been a reduction and repayment of excess profits tax. The facts are succinctly stated in the special case, have been set out by Lord Morton of Henryton, and need not be repeated.

As appears from the case, two opposing methods have been suggested for computing the profit of the respondents for income-tax purposes where repayment or deduction of excess profits tax comes into question: one is that adopted by the subject and the other by the Crown. The Commissioners have accepted that put forward by the subject and ask whether they are right in so doing. The Court of Session upheld their view and the Crown now appeal from that decision. In substance the solution of this controversy depends upon the true construction of the terms of ss. 15 and 18 of the Finance (No. 2) Act, 1939.

Excess profits tax is imposed by s. 12 of that Act, under s. 14 the profits of the standard period or of any chargeable accounting period are to be separately computed, and s. 21 makes excess profits tax payable one month after assessment, but these provisions have at best only an indirect bearing upon the point at issue. Your Lordships are concerned not with profits themselves but with the method by which relief is given to the taxpayer where profits and excess profits have been earned in one or more years and a deficiency of profit has occurred in a later year or years.

Section 15, sub-s. 1 merely provides the method by which the amount of a deficiency is to be ascertained. Sub-section 2 is concerned with the manner in which that deficiency is to be treated. It begins by asserting that in case of deficiency in any chargeable accounting period the profits chargeable with excess profits tax shall be deemed to be reduced. Read without any further explanatory words I should myself understand that statement to mean that the totality of that portion of the profits which is so chargeable and has been earned before a deficiency occurs is to be diminished by the amount of the deficiency occurring in any subsequent chargeable accounting period, not that any particular accounting period was to suffer such reduction. This view is supported by the statement in (*a*) of that sub-section which provides that the aggregate of profits so chargeable for the previous accounting periods is to be deemed to be reduced and as a consequence the amount of excess profits tax payable is to be reduced accordingly. It is the aggregate of the excess profits of previous accounting periods which is to be reduced, not those of each separate period ; and this expression must, I think, mean that, whereas each deficiency is to be written off against previous excess profits as it occurs, the excess profits are not to be divided into their constituent parts but treated as a lump sum regardless of when they have been obtained. Therefore no provision is made in the sub-section for attributing the deficiency to any particular past year—the whole deficiency is to be written off against the totality of excess profits previously made. It may wipe them completely out, it may only reduce them in part.

It may, however, happen that the deficiency exceeds the excess profits earned in former years, and this last case is dealt with in s. 15, sub-s. 2 (*b*), which enacts that, if the deficiency exceeds the aggregate amount of the profits chargeable to excess profits tax, the balance is to be applied in reduction of such profits in future years, the profits of each year in turn being reduced by the amount of the deficiency remaining unrelieved until the whole of the deficiency has been made up. It is not unnatural that, where there has first been the incidence of excess profits and then a deficiency, those profits should be added together and the deficiency treated as a reduction of the aggregated sum. But this method of procedure gives no ground for implying that the deficiency is to be written off each year's excess profits as a separate entity, starting with the first and continuing year after year until the whole has been wiped out. Where the law adopts the last-mentioned method it can say so in plain terms, and does so in s. 15, sub-s. 2 (*b*) where future years are being dealt with. I find nothing in these provisions to say that the whole accounts are to be reopened for the purpose of calculating to what sum profits, whether subject to excess profits tax or not, amount or what sum is deductible from the excess profits of any particular period, nor do I see any reason why the true figures should not continue to prevail. The actual profits and the actual sums chargeable with excess profits tax for each period remain constant and can be accurately set out, and those figures are unaffected by the circumstance that the aggregate sum due for excess profits tax may have to be reduced. Section 15 is not concerned with individual chargeable accounting periods where the past is concerned. It aggregates past gains until there is a deficiency and then deducts this deficiency from the aggregate sum. When this has been done the sub-section provides that relief shall be given by repayment or otherwise, and this must, I think, mean that it can be given either by a cash payment or in any other way in which a debt can be discharged, e.g., by set-off against a debt due to the Crown.

Section 18 deals with a different question. By reason of its terms and by them alone, excess profits due in respect of any chargeable accounting period are deductible from the total profits earned for the purpose of ascertaining the profits chargeable to income tax for that period. The first portion of that section is not to my mind confined to cases where a deduction is claimable. It is applicable to all cases, and primarily to a case where there has been no deficiency. Moreover, it treats each chargeable accounting period as a separate entity, and, prima facie at any rate, has under consideration the actual figures, not those deemed to exist for the purpose of deficiency deductions. In my opinion the proviso which follows supports this view. As I read it, though the amount of a subsequent deficiency may reduce the previous excess profits in whole or in part, the reduction is, or is to be deemed, to affect the total sum of those profits, and is not to be regarded as altering the actual periodic profits of any previous chargeable accounting period which have already been or may thereafter be ascertained. The amount of the deduction allowed to be subtracted from profits, because they were subject to payment of excess profits tax, is not to be altered, but the sum deducted is to be attributed as a profit to the chargeable accounting period in which the deficiency occurs. For myself, I find it difficult to understand what "the deduction allowed under "this section shall not be altered" means or what deduction is referred to unless it refers to the deduction given after ascertaining what the actual profits were for the relevant period and what the consequent sum originally subjected to excess profits tax amounts to. I do not know why it should be contemplated that the reduced sum upon which excess profits tax is imposed should be subsequently altered or what state of facts would make it desirable to alter it. The section is concerned with the question of excess profits tax, payable over the whole period during which the Act is in force, and is not meant to alter the income tax already assessed or assessable in respect of each separate accounting period. The aggregate amount of excess profits tax alone is to be diminished. Indeed that is all with which the opening words of s. 15, sub-s. 2 (*a*) deal. In my opinion this construction provides a coherent and comprehensive scheme requiring as little alteration as possible in figures already ascertained, and is in accordance with the provision in s. 21 which contemplates an asertainment of the excess profits tax due in respect of each period and its payment one month after assessment.

The Crown, however, say that such a construction gives the go-by to two vital considerations and neglects the express wording of the sections. In the first place they contend that ss. 15 and 18 appear in the same fasciculus of the Act and each must be read in the light of the other. Section 15, sub-s. 2 (*a*), they say, provides that profits "shall be deemed "to be reduced by the amount of the deficiency", and that result cannot be attained without also reducing to that extent the sums chargeable with excess profits tax in each chargeable accounting period; and that it is this latter sum so reduced which is ultimately to be deducted from the total profits attributable to each accounting period. If, then, the sum chargeable with excess profits tax be reduced by the amount of the deficiencies and the result is to reduce it to nothing, there is no excess profits tax payable and therefore none deductible under

s. 18, sub-s. 1. It is, they maintain, the ultimate sum upon which excess profits tax is payable which is deductible from the profits liable to pay income tax, not the provisional sum which is arrived at by taking account of an individual year's working.

I doubt whether this interpretation gives enough weight to the use of the word " deemed " or to the fact that the relief granted is confined to a reduction in the aggregate amount of profits over all the years. Both seem to me to point to an inference that the deduction is to give relief in respect of over-paid or over-payable excess profits tax and nothing more. But any doubt which might exist is, in my opinion, set at rest by the enactment in the proviso to s. 18, sub-s. 1 that the amount of the deduction allowed under the section shall not be altered. The Revenue representatives meet this argument by contending that the words " the amount of excess profits " tax payable " in s. 15, sub-s. 2, and s. 18, sub-s. 1 must be read as meaning ultimately payable, i.e., the sum payable after the appropriate deduction for deficiency has been made. Even, however, in s. 15, sub-s. 2 " payable " appears to me to refer to the actual and not the reduced figure. The sum payable remains what it previously was, but it is to be deemed to be reduced for the purpose of giving relief and for that purpose only. Nor do I see any reason for construing the wording of s. 18, sub-s. 1 as meaning ultimately payable. The phraseology might indeed be capable of meaning either the excess profits tax payable upon the actual figures appertaining to the particular period or the reduced amount after deducting the permissible deficiencies. The provision that the deduction allowed is of the excess profits tax payable in respect of any chargeable accounting period might of itself tend to cause a preference for the earlier version, but, as I have already indicated, the provision against alteration of the amount of the deduction allowed is in my view decisive.

In the second place the appellants contend that, even if the conclusion indicated is to be preferred, nevertheless the proviso to s. 18, sub-s. 1 is only applicable to a case where and to the extent to which actual payment and repayment have been made. Had the respondents paid the excess profits tax in full upon the figures agreed before any deduction for later deficiencies, then, in their submission, relief would have been claimable, the proviso would apply and the amount of the deduction already allowed could not be altered. In the present instance, however, only 1,000*l*. has been paid, and for that sum credit has been given. Apart from the payment of the 1,000*l*. and repayment of 483*l*. found to have been overpaid when the final liability was ascertained, no sum was paid or repaid in respect of excess profits tax. Repayment, it is said, is used in that section in its strict sense of a cash payment: where anything other than cash payment is intended the Act is explicit in its term. "Relief" says s. 15, sub-s. 2 (*a*) " . . . . shall be given by repayment or otherwise."

The appellants therefore maintain that in such a case as this the amount of the deduction originally allowed under the section is to be altered and the ultimate amount of excess profits tax due after the relevant deductions for deficiencies have been made is alone to be taken from the profits of the year. As in fact no excess profits tax is payable for the relevant accounting period, no sum is to be allowed to be deducted in arriving at the profits.

My Lords, whatever force the last observation may have, it is not open to this House to consider what might be an appropriate solution of such events as are now being dealt with. The question is not what might have been done, but what the Act provides. The argument, as I see it, depends upon the distinction to be drawn between the words "repayment or otherwise" in s. 15 and "repayment" in s. 18. Repayment is not, nor indeed is payment, a term of art. It can be effected in any way which puts an end to the indebtedness between one person and another. Set-off is payment as much as the tender of cash. Where the Crown is engaged in settling accounts with the subject it is natural and desirable that a repayment in cash should be authorized if the return of money paid is contemplated; and, if this authority is given, it is again natural that the method of relief shall not be confined to a cash payment and that the words "or otherwise" should be inserted to make this clear. But where no question of the authority of the Crown to make a cash payment is involved, the generic term "repayment" may well be used to cover any kind of repayment such as a set-off of indebtedness on the part of the subject.

The omission of the words "or otherwise" in s. 18 seems to me altogether inadequate as a foundation for the argument presented, and it would be an odd result if, as was conceded by the Crown's advisers, the respondents' calculations should be right if they had paid or tendered each sum due for excess profits tax or indeed paid the whole sum due and then received back the overplus, whereas if they waited until accounts could be conveniently settled their indebtedness should be calculated on a totally different basis. It is, as the Lord President points out (1), the amount of any excess profits payable which is to be deducted—not, as the Act of 1916 provided, those paid; and, as he says, the change may well be significant. The general scheme of the Act in my opinion deals with the matter on the basis that past accurate computations should not be interfered with, but the matter should be adjusted by adding the sum deducted to profits in the year of deficiency. No doubt the respondents gained by not having to pay the excess profits tax originally charged, but on the other hand they are deprived of the right to set off their loss against future profits.

In these circumstances I cannot say that the Court of Session was wrong—indeed, I think its conclusion was right, and I would dismiss the appeal.

LORD NORMAND: My Lords, I agree with the opinion of my noble and learned friend on the woolsack.

The question in the appeal turns on the construction of ss. 15 and 18 of the Finance (No. 2) Act, 1939.

Section 15, sub-s. 1 provides for the ascertainment of a deficiency of profits in any chargeable accounting period. Section 15, sub-s. 2 enacts that when a deficiency occurs in any chargeable accounting period the profits chargeable with excess profits tax shall be deemed to be reduced, and it then goes on to deal with the consequential relief. Under para. (*a*) the aggregate of the profits chargeable for the previous chargeable accounting periods is to be deemed to be reduced by the amount of the deficiency and the amount of excess profits tax payable in respect of the aggregate is to be deemed to be reduced accordingly. The relief necessary to give effect to the reductions is to be given by repayment or otherwise. Paragraph (*b*) deals with the case where the amount of the deficiency exceeds the aggregate amount of the profits chargeable for the previous chargeable accounting periods. In that event the balance is to be applied in reducing any profits chargeable for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of these profits, any profits chargeable for the next subsequent chargeable accounting period and so on. Pausing there I think that there is not much doubt about what is intended. Section 15, sub-s. 2 is designed to secure that if excess profits have been earned in one or more chargeable accounting periods, but if a deficiency has occurred in a subsequent chargeable accounting period, the taxpayer shall pay excess profits tax only on the net aggregate. In the first part of the section I think " the " profits chargeable with excess profits tax " means the total chargeable profits whenever earned and irrespective of the particular chargeable accounting period in which they were earned. There are two significant differences between para. (*a*) and para. (*b*). Under (*a*) the deficiency is set against the aggregate of past profits, which is to be deemed to be reduced by the amount of the deficiency. Under (*b*) the excess profits chargeable for the subsequent chargeable accounting period are to be actually reduced. I agree with my noble and learned friend on the woolsack that there is no indication that the computation of excess profits for any chargeable accounting period before the chargeable accounting period in which the deficiency occurred is to be re-opened. The words " shall be " deemed to be reduced " occur three times in s. 15, sub-s. 2, and I think that they cannot be ignored or treated as negligible. One must ask for what purposes the total profits chargeable with excess profits tax, or the aggregate amount of the profits so chargeable for the chargeable accounting periods previous to the chargeable accounting period in which the deficiency occurred, or the amount of excess profits tax payable in respect of this aggregate, are to be deemed to be reduced. The answer supplied by the context is that it is for the purposes of giving the relief from excess profits tax made necessary by the occurrence of a deficiency of profits. The words " shall be deemed " appear also in s. 15, sub-s. 1, and there they are qualified by the words " For the purposes of this " Part of this Act," because it is intended that the event which has been deemed to occur should affect not only the computation of excess profits tax but also the computation of income tax. The omission of the words " For the purposes of this Part of " this Act " in s. 15, sub-s. 2 seems to me to be significant.

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(1) 1948 S. C. 686, 693.

If that is the meaning of s. 15, sub-s. 2, its provisions seem to have no bearing upon the problem dealt with in s. 18. Section 18 deals with the computation of profits for the purposes of income tax, and the first part of s. 18, sub-s. 1 provides that the amount of the excess profits tax payable for any chargeable accounting period shall be deductible as an expense in computing profits for income tax purposes for the period. "The amount of the excess profits tax payable . . . . for any "chargeable accounting period" must, it seems to me, mean the amount of excess profits tax arrived at for each several accounting period. When no deficiency has occurred, or when payment of excess profits tax has been made in each year before a deficiency occurred that is admittedly the meaning of the words. I think it must also be their meaning where a deficiency has occurred after a year or a succession of years in which excess profits have been earned and where the provisions for aggregating the past excess profit and deeming them to be reduced by the amount of the deficiency fall to be applied before any payment of excess profits tax has been made.

The Crown, however, relied on the proviso to s. 18, sub-s. 1, as well as upon s. 15, sub-s. 2. The proviso deals with the case where relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which a deficiency occurs. I think that it is intended to cover all those cases to which the method of aggregation and deduction is applied by s. 15, sub-s. 2 (*a*). In those cases the proviso says that "the amount of the deduction allowed "under this section shall not be altered." Unless these words mean that the deduction of the amount of the excess profits tax payable in respect of each particular chargeable accounting period is to stand, I do not know what they can mean. And if that is their meaning the method of aggregation and deduction and its results provided for by s. 15, sub-s. 2 (*a*), in which the particular chargeable accounting periods are disregarded, are expressly excluded from having any place in the calculation of profits for the purposes of income tax.

My Lords, I am aware that the meaning which I have put upon the relevant sections does not avoid all the difficulties of construction. I appreciate that the words "relief is given "by way of repayment," which in themselves are appropriate to cover both those cases in which relief is given by a cash repayment and those cases in which relief is given by set-off, nevertheless throw the mind back to the words "relief . . . . "shall be given by repayment or otherwise" in s. 15, sub-s. 2 (*a*) and may reasonably lead to the inference that the proviso to s. 18, sub-s. 1 is limited to the case where relief is given by a cash payment. I will add that on the Crown's construction it might result that the liability of the taxpayer for income tax would be heavier if, instead of paying excess profits tax year by year, he postponed payment till the deficiency had occurred and the provisions of s. 15, sub-s. 2 had come into operation. But I do not rely on the comparative equity of the rival contentions of parties. I prefer the construction submitted by the respondents, and it is enough to say with my noble and learned friend on the woolsack that it has not been shown that the interlocutor under appeal is erroneous.

LORD MORTON OF HENRYTON: My Lords, this is an appeal against an interlocutor pronounced by the First Division of the Court of Session, as the Court of Exchequer in Scotland, upon a case stated under s. 149 of the Income Tax Act, 1918. The facts giving rise to the appeal are fully set out in the case stated, but I must repeat some of them in order to state the contentions of the parties and my views upon these contentions.

The question raised in the case is whether the General Commissioners of Income Tax for the Lower Ward of Lanarkshire adopted the correct method of dealing with excess profits tax in arriving at the profits of the respondents for the purpose of income tax. The matter depends upon the deductions allowable, in arriving at such profits, on account of liability in respect of excess profits tax. [His Lordship having stated the facts and set out the relevant section of the Finance (No. 2) Act, 1949, continued:] The method adopted by the General Commissioners was the method adopted by the respondents in their Table A and consequently the only question before your Lordships' House is whether the method adopted in Table A is right or wrong.

Counsel for the respondents explains and seeks to justify this method as follows: in the first place, he says, you must look at s. 18 of the Act of 1939. That is the section under which payments of excess profits tax can be deducted as an expense. Following the words of that section, and taking the first of the five relevant chargeable accounting periods, you find that 3,548*l.* is "the amount of the excess profits tax "payable in respect of" the respondents' business for that chargeable accounting period. That sum is therefore deductible, under s. 18, "as an expense incurred in that period." The scheme of the Act of 1939 is to treat each chargeable accounting period separately, and once you have found out what are the excess profits in respect of a particular chargeable accounting period, and what is the excess profits tax payable in respect thereof, you have arrived at an allowable deduction which cannot subsequently be disturbed. If there is a subsequent " deficiency of profits," as defined in s. 15, the proviso to s. 18, sub-s. 1 comes into operation and the words " where .... " relief is given by way of repayment " are not limited to the case of a repayment in cash. Consequently, in Table A the respondents rightly deducted the " excess profits tax " payable as finally agreed " in each of the first three chargeable accounting periods, and as it was found that there was a " deficiency of profits " amounting to 8,465*l.* in the fourth period, they rightly did not disturb the deductions already made in each of the first three periods; the deficiency of 8,465*l.* was correctly taken into account " as if it were a profit " of the trade or business accruing in the chargeable accounting " period in which the deficiency occurs," in accordance with the concluding words of the proviso to s. 18, and the same observation applies to the subsequent " deficiency " of 586*l.* Thus Table A is correct throughout.

My Lords, it may at once be observed that the argument just summarized, if correct, leads to remarkable results. Taking the year to July 31, 1941, as an example, the respondents' method of calculation would allow them to deduct, " as an expense incurred in that period," within the meaning of s. 18, a sum of 1,384*l.* in respect of excess profits tax, which never was paid and never will be paid by them.

Before considering the respondents' argument in more detail, it is desirable that I should state my views upon the meaning of the word " payable " in the first line of s. 18. The learned judges of the First Division appear to have thought that the Crown's argument involved reading this word as meaning " actually paid " and the wording of Table B would seem to indicate that the Crown might desire so to contend. No such argument was advanced before this House. I would add that, although the wording of Table B is ill-chosen, it may well be that the ill-chosen wording conceals a perfectly correct line of reasoning which arrives at a perfectly correct result. However, the correctness of Table B is not at the moment under consideration, and I turn to the construction of the word " payable " in s. 18.

My Lords, in my view the word " payable " in s. 18 has no strained or artificial meaning. It is used in the same sense as it is used in s. 21 and in s. 15. The amount of the excess profits tax payable in respect of each chargeable accounting period is ascertained in the manner laid down in the Act and the tax becomes " payable " at the expiration of one month from the date of assessment. That amount the taxpayer is allowed to deduct as an expense incurred in respect of that period. If, however, there is a deficiency of profits in a subsequent chargeable accounting period, s. 15, sub-s. 2 comes into operation. The aggregate amount of the profits chargeable with excess profits tax for the previous chargeable accounting periods is to be " deemed to be reduced " by the amount of the deficiency and the amount of excess profits tax " payable " in respect thereof is to be " deemed to be reduced " accordingly. The relief necessary to give effect to this " deemed " reduction is to be given " by repayment or otherwise." It seems to me that the method of giving relief by repayment can only be adopted when there has been a previous payment, or previous payments, by the taxpayer— and it turns out that, having regard to the " deemed " reduction, he has paid too much. The obvious, and possibly the only way of giving relief, if the taxpayer has paid no excess profits tax, is by way of set-off against the debt originally due to the Crown under s. 21. It may be convenient if at this stage I apply the provisions of s. 15, sub-s. 2, as I understand them, to the figures in Table A, disregarding as Table A disregards, the payment of 1,000*l*. in 1943 and the repayment of 483*l*. in 1946.

1. A " deficiency of profits " occurred in a chargeable accounting period, namely a deficiency of 8,465*l*. in the year ending July 31, 1943.

2. The aggregate amount of the profits chargeable with excess profits tax for the previous chargeable accounting periods must therefore be " deemed to be reduced " by the sum of 8,465, in accordance with the opening words of s. 15, sub-s. 2 (*a*), and the amount of excess profits tax payable in respect thereof must be " deemed to be reduced accordingly." The amount of the profits chargeable with excess profits tax for each of the first three periods is not mentioned in Table A. For the present purpose I shall assume that it was the same as the sum there stated to be " excess profits tax payable as " finally agreed," as excess profits tax was at the rate of 100 per cent. for the whole of the second and third periods and for part of the first period. On this footing, the aggregate amount which must be " deemed to be reduced " was 3,548*l*. plus 1,384*l*. plus 4,636*l*., or a total of 9,568*l*.

3. Section 15, sub-s. 2 (*a*) does not define exactly how this "deemed" reduction is to be applied to the aggregate amount of 9,568*l*., but the most natural way of applying it would seem to be first to reduce the 3,548*l*. to nil, then to reduce the 1,384*l*. to nil and then to reduce the 4,636*l*. to 1,103*l*. In this way effect will have been given to the total "deemed" reduction of 8,465*l*., and the respondents do not seek to contest this method of carrying out the "deemed" reduction if they fail in their contention that the figures of 3,548*l*., 1,384*l*. and 4,636*l*. ought to be left unaffected by the deficiencies of profits in subsequent chargeable accounting periods.

4. In the year to July 31, 1944, there was again a "deficiency "of profits" amounting this time to 586*l*. This will be applied in reducing the 1,103*l*. to 517*l*.; thus there remains a balance of 517*l*. of excess profits tax payable in respect of the year to July 31, 1942, and no further excess profits tax became payable prior to the repeal of that tax in December, 1946.

My Lords, with all respect to those who have thought otherwise, I cannot see that this method of applying the provisions of s. 15, sub-s. 2, involves giving an artificial meaning to the word "payable" in s. 18, or that it involves giving to that word a twofold or threefold meaning, depending upon the events which actually happen. To my mind, "payable" always has the same simple meaning as it has in s. 21, but in certain events the amount payable is deemed to be reduced.

Taking again, as an example, the year to July 31, 1941, the respondents claim to deduct 1,384*l*. as an "expense" under s. 18, sub-s. 1. They say: "This sum was 'payable' under "s. 21, sub-s. 1, and therefore we can deduct it." To this the appellants reply, "True, it was 'payable' under s. 21, "sub-s. 1, and we do not seek to give any other meaning to "the word 'payable' in s. 18, sub-s. 1. But we do say that "it is 'deemed to be reduced' to nil under s. 15, sub-s. 2, "and therefore you can deduct nothing as an expense. If you "had paid the 1,384*l*., relief would be given 'by way of repayment' and the proviso to s. 18, sub-s. 1, would have applied; "the 1,384*l*. would have been brought into a later year 'as "'if it were a profit of the business accruing' in that year, "and the figures given in Table A would have been correct. "As it is, relief is given 'otherwise,' namely by way of a set-off, "and the figures in Table A are wrong."

To my mind this contention of the Crown is unanswerable, and shows that Table A cannot be correct. It is true that I have so far disregarded the payment of 1,000*l.* and the repayment of 483*l.*, but I cannot see that any introduction of these figures into Table A can possibly make that Table correct, if I am right in my construction of s. 15, sub-s. 2, and if, as I think, " repayment " in the proviso to s. 18, sub-s. 1, can only mean repayment in cash. I shall return to consider this proviso, but meanwhile I must consider the payment of 1,000*l.* and the repayment of 483*l.* As to the 483*l.* no difficulty arises. I have already shown that the total excess profits tax payable in respect of the whole period, after s. 15, sub-s. 2 has been put into operation, is 517*l.* The respondents have paid 1,000*l.* Therefore 483*l.* is due to them and this sum must be paid in cash, since there is no sum against which it can be set off. Here the proviso to s. 18, sub-s. 1 comes into play, and the 483*l.* must " be taken into account in computing the " profits and gains of the trade or business for the purposes " of income tax as if it were a profit of the trade or business " accruing in the chargeable accounting period in which the " deficiency occurs."

I am relieved of the task of considering at this point exactly how the 1,000*l.* should be taken into account, by reason of a concession and statement by counsel for the respondents. He conceded that if s. 15, sub-s. 2 were construed as I construe it, Table A must be incorrect, and he stated that in this event his clients were willing to accept a suggestion of the appellants which appears in Table B, that the 1,000*l.* should be allowed as a deduction, for the purposes of income tax, as an expense incurred in the year ending July 31, 1940, and that the 483*l.* should be brought in as it were a profit of the business accruing in the year ending July 31, 1944.

I now turn to consider the argument of counsel for the respondents, as already summarized. It will be observed that throughout his argument counsel disregarded, as Table A disregards, the payment of 1,000*l.* in 1943 and the repayment of 483*l.* in 1946. In my view there are at least two fatal flaws in the argument of counsel for the respondents.

In the first place, the method adopted in Table A, and sought to be upheld by counsel, gives no effect at all to the provisions of s. 15, sub-s. 2. No heed is paid to the " deemed " reduction of excess profits tax for which provision is made in that sub-section. The First Division found it possible to accept the respondents' argument, and the Lord President said, in the course of his opinion (1): "The argument of the Inland "Revenue had to be that, so long as excess profits tax existed "(i.e., until December, 1946), assessments to that tax were "merely provisional, and that there was no finality for either "excess profits tax liability or income tax liability until the "whole six years of the emergency tax had run their course "so that it could be known whether, and to what extent, "relief under s. 15 might be claimable." This argument he found unacceptable. I respectfully agree with the Lord President that the Crown's argument has this result, but I think that the wording of s. 15, sub-s. 2 renders its acceptance inevitable. That sub-section makes it impossible to ascertain the amount of excess profits tax for which a taxpayer may ultimately be liable, in respect of any chargeable accounting period, until excess profits tax ceases to be in force. I would add two observations. First, that excess profits tax was essentially a temporary measure, although, of course, the legislature could not know exactly how long it would last; secondly, that the respondents' argument has far stranger results. As I have already pointed out, if it were correct it would enable them to deduct, as an expense, large sums on account of excess profits tax which was never paid and was ultimately found not to be payable.

In the second place, the latter part of the argument of counsel for the respondents (dealing with the event of a subsequent deficiency of profits), rests upon his contention that the word "repayment" in s. 18 is not limited in its meaning to a repayment in cash but covers every case in which relief is given, including a case in which relief is given by set-off. In my judgment this word can only refer to a repayment in cash. I think that this is its more natural meaning, in the context in which it appears, but if there were any doubt on the point it is removed by the words "the relief necessary "to give effect to the reduction shall be given by repayment "or otherwise" at the end of s. 15, sub-s. 2 (*a*). In my view the word "repayment" must bear the same meaning in s. 18, sub-s. 1, as it bears in s. 15, sub-s. 2 (*a*). In the latter sub-section relief given "by repayment" is contrasted with relief given "otherwise," and I think that "repayment" in this context plainly means repayment in cash, as contrasted with relief given in any other manner. The respondents' argument gives no meaning at all to the words "or otherwise" in s. 15, sub-s. (*a*). The words in the proviso to s. 18, sub-s. 1 " where . . . . relief is given by way of repayment " show that the proviso applies only where one particular method of giving relief is adopted and the method referred to can only be, in my view, the method of repayment in cash. In the present case only 483*l*. was repaid in cash ; yet in Table A the respondents treat two sums of 8,465*l*. and 586*l*. as coming within the proviso to s. 18, sub-s. 1.

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(1) 1948 S. C. 686, 694.

My Lords, as I have said, the only question before this House is whether the method adopted in Table A is right or wrong. I have endeavoured to show that it is wrong in two vital respects, viz. (*a*) it gives no effect at all to the provisions of s. 15, sub-s. 2 and (*b*) it treats two sums of 8,465*l*. and 586*l*. as coming within the proviso to s. 18, sub-s. 1, although neither of these sums was the subject of a cash repayment. If Table A does not show the correct method of dealing with excess profits tax in arriving at the profits of the respondents for the purpose of income tax, the question of law must be answered in the negative.

It would not be right for me to express a concluded view as to how the respondents' payment of 1,000*l*. should be treated, assuming that my view as to the construction of the Act is correct. This point has not been argued, for the reasons which I have already stated. Nevertheless, I think it is right that I should state one way in which I think it might be treated because by so doing I shall show, as I hope, that my construction need not lead to any strange result in a case where part, but not all, of the excess profits tax " payable " under s. 21, sub-s. 1 has been paid before " a deficiency of profits " occurs. I think it is reasonable to treat the 1,000*l*. as a payment on account of the excess profits tax payable for the year to July 31, 1940, and the appellants have so treated it with the assent of the respondents. It follows that when relief has to be given to give effect to a " deemed " reduction of 9,051*l*. (8,465*l*. + 586*l*.) relief can be given by way of repayment in respect of part of the " aggregate amount " of 9,568*l*. (3,548*l*. + 1,384*l*. + 4,636*l*.) and relief can be given by way of set-off against the remainder. By setting off the 9,051*l*. against the 9,568*l*. the excess profits tax payable is reduced to 517*l*. But as the respondents have paid 1,000*l*., 483*l*. is due to them as a repayment. As I have already pointed out, the proviso to s. 18, sub-s. 1 comes into play as respects this repayment in cash. The respondents have already paid 1,000*l*. That sum was part of the excess profits tax "payable" within s. 18, sub-s. 1, although the sum "payable" was ultimately "deemed to be reduced." Accordingly, if there had been no subsequent 'deficiency of profits" the respondents would have been able to deduct it, as an expense, for the purpose of income tax. Following the words of the proviso to s. 18, sub-s. 1, the amount of the deduction allowed under s. 18, sub-s. 1 (namely, a deduction of 1,000*l.* in respect of the year ending July 31, 1940) is not altered, but the 483*l.* repayable is taken into account "as if it were a profit of the trade or "business accruing in the chargeable accounting period in "which the deficiency occurs." I see no difficulty in dealing with the payment and repayment in this way. It may be that in Table B the 483*l.* is brought in as a profit a year too late, but to this the respondents do not object.

I think I should add that if my reasoning is incorrect and the argument for the respondents is to be accepted, it would appear to be necessary to explain how Table A can be correct in disregarding the payment of 1,000*l.* and the repayment of 483*l.*, and how these sums shall be treated. I find no light upon this point in the respondents' case. Nor does it appear to be dealt with in the opinions delivered in the First Division of the Court of Session.

I would allow the appeal and answer the question of law in the negative.

LORD MACDERMOTT: My Lords, if the submission of the Crown is to prevail the words "the amount . . . payable" in the first part of s. 18, sub-s. 1, of the Finance (No. 2) Act, 1939, must bear a complex and unnatural meaning. They must, as I follow the argument, mean the greater of (*a*) the amount ultimately payable, i.e. the amount of excess profits tax payable in respect of a particular year as subsequently reduced by way of relief under s. 15, and (*b*) the amount actually paid as excess profits tax in respect of the same year. It is material to observe that the first part of s. 18, sub-s. 1, is an enactment of general applicability. It makes excess profits tax deductible as an expense for income-tax purposes irrespective of whether or not a right to relief under s. 15 arises; and if it could be read apart from its proviso and s. 15, the submission of the Crown would clearly be untenable. So read, I think there can be no doubt that the words "the "amount . . . . payable" would connote nothing more or less than the excess profits tax liability as computed for the year in question. They would hold no warrant for looking beyond what could be assessed and levied at the end of such year, and payment would be an irrelevant consideration.

The first question, then, is whether the effect of s. 15 and the proviso to s. 18, sub-s. 1, is to expand and modify this prima facie meaning so as to accord with the contentions of the Crown. Regarded alone s. 15 would not justify the view that "the amount . . . . payable" may mean, on occasion, not the liability but a different amount measured by the sum actually paid. But it would go some way to justify the view that "payable" means "ultimately payable" if, in sub-s. 2 (*a*) thereof, the word "deemed," in the direction "and the "amount of excess profits tax payable in respect thereof "shall be deemed to be reduced accordingly," could be construed as meaning "deemed for the purposes of this Part of "this Act." Coming, however, to the best conclusion I can on the language of the statute, I do not think that would be the right interpretation. It seems to me that sub-s. 2 is concerned primarily with the granting of relief from liability in respect of a period, which may span several years, rather than with the re-opening and adjustment of each of the previous assessments. The machinery of para. (*a*) starts its work on actual profits and actual liabilities. The first are to be "deemed to be reduced" in the aggregate, but that can only be notional and for the purpose of sub-s. 2. The second are to be "deemed to be reduced accordingly," and I do not think this reduction can fairly be regarded as intended to fulfil a wider purpose. If that is right I can find no good reason for reading "payable" in s. 18, sub-s. 1 as "ultimately "payable," for there is nothing in the proviso to that subsection, taken either alone or in conjunction with s. 15, to support that interpretation. The proviso does not purport to modify what has gone before. On the contrary it directs, in regard to the only kind of event with which it is concerned, that "the amount of the deduction allowed under this section "shall not be altered."

But even if the view of s. 15 which I favour is wrong it does not follow that the Crown case is right. It is not enough for the Crown to say that "payable" means "ultimately payable" and to stop there. To do so would, where relief under s. 15 has been given by way of repayment, lead to an impossible result, for the proviso would then operate to charge the subject.

who because he had paid had got a repayment, a second time in respect of the same parcel of profits. It is to avoid the entanglements thus created by the difficult terms of this proviso that the Crown definition of "payable" assumes the form of "ultimately payable or actually paid, whichever "amount is the greater." This is not a severable proposition and the first part of it cannot survive alone.

My Lords, I have had the advantage of reading in print the opinions of my noble and learned friends Lord Porter and Lord Reid and I desire to express my concurrence with the reasons which have led them to reject the construction placed upon the word "payable" in s. 18, sub-s. 1, by the Crown. I need not repeat those reasons; but I would, if I may, add a further ground for the same conclusion which seems to flow from the considerations to which I have just referred. A proviso in a statute must, no doubt, be read and have effect according to its tenor; but its nature is not to be overlooked in the task of interpretation, and in the absence of some compelling context (of which I see no sign in the present case) it is not a legitimate process, in order to resolve some doubt or difficulty arising from a proviso, to use it, so to speak, as a lever to force plain words in the enactment to which it is appended away from their natural meaning. Here, I think, that is what the Crown has endeavoured to do and that is one of the reasons why its contentions should not succeed: see *West Derby Union* v. *Metropolitan Life Assurance Society* (1). As Lord Herschell there observed: "Of course a proviso may be used "to guide you in the selection of one or other of two possible "constructions of the words to be found in the enactment, "and shew when there is doubt about its scope, when it may "reasonably admit of doubt as to its having this scope or that, "which is the proper view to take of it; but to find in it an "enacting provision which enables something to be done "which is not to be found in the enactment itself on any "reasonable construction of it, simply because otherwise the "proviso would be meaningless and senseless, would, as I have "said, be in the highest degree dangerous."

The next question is whether the respondents' method of computation complied with the terms of the statute. It is based on a construction of s. 18, sub-s. 1, which cannot be accepted merely because that of the Crown is rejected, though the case appears to have been presented throughout as a matter of choice between the rival interpretations and on the basis that if one fell the other stood. The respondents' submission as to the meaning of the words " the amount . . . . payable " accords with what I think is the right view. The trouble is with their construction of the proviso. Though it applies only where " relief is given by way of repayment from excess " profits tax chargeable . . . . " they say that this extends to any relief which may be given under s. 15, sub-s. 2 (*a*) and, consequently, that in the instant case " the amount repayable," which under the proviso is to be brought into account as a profit in the deficiency year, includes all the excess profits tax liability in respect of which relief has been granted and is not limited to the actual repayment of 483*l*. This meaning has the virtue of giving the proviso a rational design by making its compensatory provisions adequate to maintain a constant balance against the operation of the words " the amount . . . . " payable " according to their true construction. But it rides so uneasily upon the language which the legislature has used that I find myself unable to adopt it. I would not feel the same difficulty if relief under s. 15 had to take the shape either of an actual repayment or of a set-off in the sense of applying one obligation to reduce or extinguish another, for " repayment " like " payment " need not always connote the passing of money. It is, however, plain that relief may commonly come to be given under s. 15 merely by virtue of the process of reduction which is deemed to be effected thereunder. That, indeed, has happened in the present case, for in it the relief was of that nature save to the extent of the 483*l*. I do not think that kind of relief can reasonably be described as " relief " . . . . by way of repayment." Nor am I able to find in the statute any context to justify such a description of it. No doubt the proviso to s. 18, sub-s. 1, must be read closely with s. 15, sub-s. 2, but that, as it seems to me, only adds another difficulty. The kind of relief under discussion either falls within the expression at the end of s. 15, sub-s. 2 (*a*)— " repayment or otherwise "—or it does not. If the former, its appropriate place is in the category covered by the words " or otherwise " and not in that covered by " repayment " ; and if the latter it is no whit nearer being given " by way of " repayment." This view, if well founded, means that there has been an unfortunate casus omissus in the drafting of the proviso. It may well be that this reflects the stress of events in 1939 when the statute was enacted ; but whatever the reason the defect is, to my mind, beyond repair by any process of adjudication, however anomalous its results.

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(1) [1897] A. C. 647, 655.

For these reasons I think the respondents' computation (Table A) is correct in law for the first three, but not for the last two, of the years under review and I would answer the question of law accordingly.

LORD REID: My Lords, in the present case a number of profitable years for the respondents, in respect of which they would have had to pay large sums of excess profits tax if these years had stood alone, were succeeded by a year in which a heavy loss was sustained and a year in which the profits fell short of the standard profits. The general scheme of the Act for dealing with such a situation is simple enough. Relief is given so that at the end of the period for which the tax is in operation excess profits tax is only due on the amount by which the aggregate of chargeable profits in the good years exceeds the deficiencies in the other years. This result must be reached by way of relief because as regards each of the earlier chargeable accounting periods, where the profits exceeded the standard profits, tax was immediately chargeable on the excess: assessments could be and were made and tax was collected before it was known that there would later be a loss. What the Act does in s. 15, sub-s. 2, is to direct that the profits chargeable with tax in the earlier good years and the tax payable in respect thereof shall be deemed to be reduced by the amount of the subsequent deficiency and to provide that the relief necessary to give effect to the reduction shall be given by repayment or otherwise. The nature of the relief must depend on whether tax in respect of the earlier years has actually been paid or not. If the sum paid by the taxpayer in respect of the earlier years is larger than his total liability for the whole period as ascertained when the later deficiency of profits is taken into account, then plainly the taxpayer must get something back and relief will operate by way of repayment. But if the taxpayer, though due to pay large sums in respect of the earlier years, has in fact paid nothing or has only paid a sum smaller than the total amount of his ultimate liability, there is no room for any repayment, and relief can operate by discharging the taxpayer's outstanding liability in respect of the earlier years to such extent as is necessary. I do not think that it is necessary to consider whether relief could operate in any other way.

So far there is no difficulty. The difficulty arises out of the inter-relation of excess profits tax and income tax. Where there is no question of a deficiency of profits in any year, again the scheme is simple enough. For income-tax purposes the amount of excess profits tax payable for any chargeable accounting period (normally a period of one year) is allowed by s. 18 to be deducted as an expense incurred in that period. So long as there is no subsequent deficiency each period can be and is treated as standing by itself : and in effect that part of the profits which exceeds the standard profits is subject to excess profits tax but not to income tax, while the remainder of the profits is subject to income tax. But the simplicity of the scheme breaks down when a subsequent deficiency of profits makes it necessary to reopen the position of the earlier years in order to operate the relief from excess profits tax to which the taxpayer is entitled. The question which arises in this case is what does the statute direct to be done as regards income tax in that event ?

I start with one direction about which there is no controversy in this case and which appears to me not to be ambiguous. Where the taxpayer has paid more than is ultimately found to be due he gets a repayment and the latter part of the proviso to s. 18, sub-s. 1 directs that this repayment shall be treated for income-tax purposes as if it were a profit accruing in the period in which the deficiency of profits occurs. The repayment is not in fact a profit and if it is treated as a profit in one year it must be offset by a corresponding allowance of a deduction in another period. This was not disputed by the Solicitor-General. I think that the position can best be made plain by a simple example. Let me suppose that in one year there is an excess profit of 5,000*l.* and in the next a deficiency of 5,000*l.* The result is that in the end no excess profits tax is due. It may be that the 5,000*l.* of tax due in respect of the first year taken by itself has been paid in full : in that case the whole of that 5,000*l.* is repayable and the statute directs that for income tax purposes it must be taken into account as a profit in the second year when there was a deficiency of 5,000*l.* Let me further suppose that the standard profits were 2,000*l.* in each year so that there was a total profit of 7,000*l.* in the first year and a loss of 3,000*l.* in the second year. The statutory direction to take into account as a profit in the second year the 5,000*l.* of excess profits tax which was repayable converts the actual loss of

3,000*l.* in that year into a profit of 2,000*l.* for income-tax purposes. If that were the only adjustment the result would be that income tax would have to be paid on the actual profit of 7,000*l.* for the first year and on the fictitious profit of 2,000*l.* for the second year, in all 9,000*l.* for the two years. But in fact the total profit for the two years taken together was only 4,000*l.* so one would expect to find a provision for a reduction of the first year's profits for income-tax purposes from the actual profit of 7,000*l.* to 2,000*l.* so that the total profits for income-tax puropses for the two years would correspond with the actual total profit for the two years of 4,000*l.* I turn to the provisions of s. 18, sub-s. 1, which is the only place where any warrant for a deduction from the 7,000*l.* profit in the first year could be found. I have already said that in a case which is not complicated by any question of deficiency of profits, s. 18, sub-s. 1 is a warrant for treating as a deduction for income-tax purposes the sum payable as excess profits tax. In that case when the tax so payable is paid it is retained by the Exchequer: in the case I am now supposing the tax has been paid but has then been repaid to the taxpayer. Does this repayment make any difference to the income-tax position for the first year? The first part of the proviso to s. 18, sub-s. 1 supplies the answer. It enacts that "the amount of "the deduction allowed under this section shall not be altered." That can, I think, only refer in the case I am supposing to the 5,000*l.* which was originally payable and was in fact paid as tax due in respect of the first year but later repaid. A direction that where relief is given the amount of the deduction shall not be altered assumes that the amount of the deduction could be and was ascertained before the relief was given. The deduction is the amount of excess profits tax "payable," so "payable" cannot mean ultimately found to be payable because that can only be ascertained after relief has been given: it must mean originally payable before any question of relief arose.

The Solicitor-General admitted, and I have no doubt rightly admitted, that the first part of the proviso means that where tax has been paid the fact that it has later been repaid makes no difference; it remains deductible as an expense for income-tax purposes notwithstanding its later return to the taxpayer. The matter is then put right not by cancelling the deduction but by treating the repayment as a profit in a later year.

The real difficulty is to determine what has to be done as regards income tax where the excess profits tax payable in respect of an earlier year has not in fact been paid and relief has to be given in respect of a later deficiency by total or partial discharge of the assessment in respect of the earlier year. The proviso appears only to apply where "relief is given by "way of repayment" and there is no corresponding provision to deal with relief given otherwise than by repayment. But if in this case one applies the first part of s. 18, sub-s. 1, giving to it the same meaning as the Solicitor-General admitted it to have and as I have tried to show it must have where the proviso applies, it is impossible, I think, to reach a reasonable result without invoking the proviso. Let me revert to the simple example which I took before, with the single difference that I now suppose that 5,000*l.* was assessed and payable as excess profits tax for the first year but not paid. The deduction allowed by s. 18, sub-s. 1, for income-tax purposes is "the "amount of excess profits tax payable" for the chargeable accounting period and there is nothing in the Act to indicate that "payable" must be held to have a different meaning or that the deduction must be calculated in a different way according to what has in fact been paid. So the 5,000*l.* would still be a deduction for income-tax purposes just as it was when that sum had first been paid and then repaid. But there would be no proviso to direct that this is to be compensated by adding in 5,000*l.* as a profit in the subsequent deficiency year.

The Solicitor-General boldly sought to get over this difficulty by arguing that the word "payable" in s. 18, sub-s. 1, has different meanings depending on what has actually been paid before the deficiency years are taken into account under s. 15, sub-s. 2. If the original assessment has been paid in full, then "payable" means payable under that assessment: if nothing has been paid, then "payable" means ultimately found to be payable after subsequent deficiencies have been taken into account: but if a part only has been paid of the amount due under the original assessment and part or all of that payment has to be repaid (as happened in this case) then "payable" has no relation either to the amount payable under the original assessment or to the amount ultimately found to be due after taking subsequent deficiencies into account, but it means the amount actually paid.

My Lords, I find it impossible to construe the phrase "the "amount of the excess profits tax payable . . . for any "chargeable accounting period" in this way. I do not deny that the word "payable" is ambiguous. A word is ambiguous because a reasonable man using it in the context in which it occurs can be supposed to have intended in so using it one of two or more different meanings, and if a word is ambiguous a court is entitled to select one of those meanings as the true meaning. But the fact that a word is ambiguous does not entitle a court to select another meaning which it is plain that no reasonable man could have intended. "Payable" is ambiguous because it might mean originally payable before the subsequent deficiency was known or taken into account or it might mean ultimately payable after that deficiency had been taken into account. But could it possibly have the complicated threefold meaning for which the Solicitor-General contends? To my mind the question in this case is whether Parliament can possibly be supposed to have intended the phrase which I have quoted to bear the meaning which I have stated. I cannot bring myself to imagine anyone having such an intention, and therefore I cannot accept the argument for the Crown. It might be that an equitable result or even a reasonable result could only be reached by attributing to a phrase in a statute a meaning which no reasonable man would attach to it. But to attribute such a meaning to a phrase would in effect be legislating and not construing the statute and that is beyond the province of a court of law. If by legitimate processes of construction no meaning can be found which is equitable or even reasonable then the matter can only be put right by further legislation.

I think it is fairly clear how s. 18, sub-s. 1 came to assume its present form. There are many similarities between excess profits tax and the old excess profits duty and under the Finance (No. 2) Act, 1915, s. 38, sub-s. 3, relief was provided to meet the case of a subsequent deficiency of profits after a year for which excess profits duty was payable. But this section was so phrased that it was necessary to pay the duty in respect of the earlier year before relief could be claimed in respect of the subsequent deficiency. Accordingly the relief could only take the forms of repayment or set-off against duty payable in respect of a still later profitable year and the main difficulty in the present case could not arise. It is not very surprising that in the circumstances of 1939 it was not observed that the change introduced by which a taxpayer can now get relief without actually paying the tax due for the earlier year necessitated a further provision dealing with deductions for income-tax purposes if a proper result were to be reached. But, however that may be, I do not think that it is possible to reach a satisfactory result merely by construing the provisions of the Finance (No. 2) Act, 1939, as they stand, and a court cannot supplement construction by legislation.

There appear to remain two possibilities. I have said that the proviso appears only to apply when relief is given by way of repayment and not when relief is given otherwise than by way of repayment. If this is taken to be the true meaning of the proviso a reasonable result cannot be reached. In the present case the taxpayer has throughout presented his case on the footing that the proviso applies not only to the tax which he actually paid and must now be repaid, but also to the further sum originally due which he did not pay, and which he is not now bound to pay because liability to pay it has been discharged by the operation of relief. This construction produces something much nearer to a reasonable and equitable result. In short, the two possibilities are that the word "repayment" means what it says or that it is wide enough to include the case when no money passes but a liability is discharged. There are serious objections to the adoption of either of these alternatives. But if I have to choose between them—because there is no other possible construction—I would choose the alternative which has been adopted by the General Commissioners and approved by the First Division in this case. I think therefore that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Solicitor for England of the Board of Inland Revenue for Solicitor for Scotland of the Board of Inland Revenue.*

Solicitors for respondent company: *Kingsley Wood, Williams & Murphy for D. G. McGregor W.S., Edinburgh, and Downie, Aiton & Co., Glasgow.*

[HOUSE OF LORDS.]

H. L. (E.)*

1949

Nov. 8, 9, 10, 14, 15, 16, 17.

1950

Feb. 9.

BARKWAY . . . . . . APPELLANT;

AND

SOUTH WALES TRANSPORT CO. LD. RESPONDENTS.

APPEAL from the Court of Appeal (Scott and Asquith L.JJ., Bucknill L.J. dissenting) [1949] 1 K. B. 54.

The plaintiff appealed from a judgment of the Court of Appeal dated July 9, 1948, setting aside a judgment of Sellers J. dated July 30, 1947, awarding to the plaintiff, as administratrix of the estate of her late husband, 2,000*l*. damages on behalf of herself and her daughter for the death of her husband, on the ground that his death had been caused by the negligence of the defendant company or their servants.

O'Sullivan K.C. and *Platts Mills* for the plaintiff.

Fox-Andrews K.C. and *Gerwyn Thomas* for the defendant company.

Feb. 9, 1950. The House allowed the appeal [1950] W. N. 95.

The proceedings in the Court of Appeal were reported only on a point of admissibility of evidence. In the course of the hearing before the Appellate Committee of the House of Lords this point was briefly disposed of by their Lordships [1949] W.N. 484 and calls for no further report, and no other point arose calling for a full report.

Solicitors: *Kenneth Brown, Baker, Baker, for D. Brindley Morris & Co., Llanelly; Stanley & Co., for David H. Clarke, Swansea.*

**Present:* LORD PORTER, LORD NORMAND, LORD MORTON OF HENRYTON, LORD REID and LORD RADCLIFFE.

[HOUSE OF LORDS.]

H. L. (E.)*

1949

Nov. 22, 23, 24.

1950

Feb. 9.

THEOPHILE . . . . . . APPELLANT;

AND

THE SOLICITOR-GENERAL (ON BEHALF OF HIS MAJESTY) . . . . . RESPONDENT.

Bankruptcy—Debtor—Alien—Business carried on in England—Debt to Crown in respect of excess profits tax—Departure of debtor to Eire and residence there—Act of bankruptcy—"Being out of England "remains out of England"—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 1, sub-ss. 1 (d), 2 (c).

An alien, having for some years carried on business in England, was assessed to excess profits tax. He subsequently disposed of his business and left England, the debt remaining unpaid, and thereafter resided in Eire. A bankruptcy petition was issued at the instance of the Crown in respect of the debt.

Held, (1.) that the debtor, although a foreign national domiciled abroad, committed an act of bankruptcy within s. 1, sub-s. 1 (*d*), of the Bankruptcy Act, 1914, since "with intent to defeat or "delay his creditors he . . . . being out of England remained "out of England . . . ."

(2.) That the debtor continued "carrying on business in "England" within s. 1, sub-s. 2 (*c*), of the Act until all trade debts were paid.

In re Dagnall [1896] 2 Q. B. 407, and *In re Reynolds* [1915] 2 K. B. 186, approved.

(3.) That the sum due from the debtor to the Crown in respect of excess profits tax was a trade debt.

Decision of the Court of Appeal (sub nom. *In re a Debtor, Ex parte His Majesty the King* v. *The Debtor*) [1948] W. N. 310; (sub nom. *In re a Debtor, No. 335 of 1947*) 64 T. L. R. 446, affirmed.

APPEAL from the Court of Appeal (Lord Greene M.R., Asquith and Evershed L.JJ.).

The facts, stated by LORD PORTER, were as follows: The appellant was a citizen of Rumania. For some years before the present proceedings he carried on a leather business in England, apparently with success. On January 1, 1946, two notices of assessment for the sum of 10,000*l*. each in respect of excess profits tax in connexion with this business, covering the two chargeable accounting periods ending March 31, 1943, and March 31, 1945, were issued to him; and on January 10, 1946, a further notice of assessment was issued

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**Present:* LORD PORTER, LORD NORMAND, LORD MORTON OF HENRYTON, LORD REID and LORD RADCLIFFE.

H. L. (E.)

1950

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GENERAL.

to him for another sum of 10,000*l.* for excess profits tax in respect of the chargeable accounting period ending March 31, 1944. On November 14, 1947, a bankruptcy petition at the instance of the Crown was issued in respect of the non-payment of these three sums, amounting to 30,000*l.* in all, which had not then been paid and remained thereafter unpaid. The petition contained the allegation that the debtor "with "intent to defeat or delay his creditors . . . . being out of "England remains out of England . . . ." He had disposed of his business by the end of 1946, and left England on October 31, 1946, residing in Eire thereafter. The assessments having been confirmed on that day by the Finsbury General Commissioners, letters demanding payment were sent to the debtor on November 9 and November 16, 1946.

On December 23, 1947, leave was given to serve the petition out of the jurisdiction, but on April 7, 1948, on the application of the debtor and on the ground that he was not "a debtor" within the meaning of the Bankruptcy Acts, Mr. Registrar Parton set aside the order. The Court of Appeal having reversed this decision, the debtor appealed to the House of Lords.

Caplan for the appellant. The appellant's first proposition is that before a petition can be presented there must be (*a*) "a debtor" and (*b*) "an act of bankruptcy" within the meaning of s. 1, sub-ss. 1 and 2, of the Bankruptcy Act, 1914. This is common ground. In the present case the appellant is not a debtor and has not committed an act of bankruptcy.

The second proposition is that both these expressions and the statutory descriptions of what is required to fulfil the conditions of the Act must be construed in accordance with the limitations imposed by the principle of construction that a British statute is prima facie to be considered as legislating only for (*a*) British subjects; (*b*) persons of British domicile; (*c*) persons within the jurisdiction; (*d*) acts done anywhere by British subjects; (*e*) acts done anywhere by persons of British domicile; or (*f*) acts done within the jurisdiction by persons who are not British by nationality or domicile.

The third proposition is that, although the word "debtor," which before the Bankruptcy and Deeds of Arrangement Act, 1913, and the Bankruptcy Act, 1914, was construed in accordance with the limitations set out in the second proposition, now has an extended meaning since those Acts, the expression "act of bankruptcy" is still to be construed in accordance with those limitations.

Furthermore, the statutory extension of the meaning of the word "debtor" was intended to be strictly construed, and accordingly the word "debtor" includes only such foreigners (viz., persons not British by nationality or domicile) as at the time of the alleged act of bankruptcy had the kind of foothold in this country referred to in s. 1, sub-s. 2, of the Act of 1914.

In re Crispin (1) and *Ex parte Blain* (2) illustrate an application of the relevant principle of construction of English statutes which here would give a limited meaning to the expressions "debtor" and "act of bankruptcy": see also *Reg.* v. *Jameson* (3) and *In re Pearson* (4). *Cooke* v. *The Charles A. Vogeler Co.* (5) supports the contention that, in considering whether the Bankruptcy Act applies, two separate matters must be determined: (*a*) whether the alleged "debtor" is within the jurisdiction as a personality, and (*b*), if he is a "debtor" within the meaning of the Act, whether what he has done amounts to an act of bankruptcy: see also *In re Debtors* (*No.* 836 *of* 1935) (6). The change in the meaning of the word "debtor" in the Act of 1913 (an amending Act) —the meaning continued in the Act of 1914—did not affect the meaning of the term "act of bankruptcy," doubtless for reasons of high policy relating to the comity of nations. But persons not formerly within the jurisdiction of the court were brought within its jurisdiction on the ground that they had a foothold in England, though not one equivalent to nationality or domicile. In the case of a foreigner, in such circumstances as the present, the departure out of England, if made with intent to defeat or delay his creditors, would be an act committed in England and would constitute an act of bankruptcy. (Here the departure could not, in any event, be relied on now by reason of lapse of time: see s. 4, sub-s. 1 (*c*), of the Act of 1914.) But remaining out of England is not an act committed within the jurisdiction, and in the case of a foreigner, it is not therefore an act of bankruptcy: see *Warner* v. *Barber* (7), and *Ex parte Brandon* (8). It is neverthe-

(1) (1873) L. R. 8 Ch. 374.
(2) (1879) 12 Ch. D. 522.
(3) [1896] 2 Q. B. 425, 430.
(4) [1892] 2 Q. B. 263.
(5) [1901] A. C. 102.
(6) [1936] Ch. 622, 633–4.
(7) (1816) Holt N. P. 175.
(8) (1884) 25 Ch. D. 500.

less possible for foreigners outside this country at the time to commit an act of bankruptcy within it, and accordingly, on the extended meaning of the expression "debtor," there is plenty for it to operate on. Such a foreigner might, for example, commit an act of bankruptcy in England by an agent or by a firm of which he was a member: see *In re Drabble Brothers* (1). The provisions of s. 1, sub-s. 2, of the Act of 1914, merely add to the category of debtors, but make no change in the meaning of the expression "act of bankruptcy" as hitherto construed. Accordingly, even if the appellant were held to be a "debtor" within the meaning of the subsection, it would still have to be shown that he, not being British by nationality or domicile, had committed an act of bankruptcy within the jurisdiction. It would be contrary to the comity of nations and the ordinary construction of Acts of Parliament to hold that an act committed abroad by a foreigner abroad comes within its scope.

The fourth proposition is that the appellant did not within three months before the presentation of the petition have any such foothold in England as is required by the Act. The Crown is incorrect in the contention that merely because he had an outstanding liability for excess profits tax he "was "carrying on business in England"; for, although the expression "carrying on a trade" in s. 1, sub-s. 5, of the Married Women's Property Act, 1882, which by way of s. 12 of the Bankruptcy and Deeds of Arrangement Act, 1913, has now been incorporated in s. 125 of the Act of 1914, may cover a person who merely has trade debts outstanding, the different words of s. 1, sub-s. 2, of the Act of 1914 ("carrying on business in England, personally or by means "of an agent or manager") do not on their strict, or on any, construction embrace a person who merely has trade debts outstanding. These words mean what they say and should not be made to cover mere constructive carrying on of business: see *Ex parte Schomberg* (2), and *Ex parte M'George* (3). *In re Dagnall* (4), *In re Worsley* (5), and *In re Reynolds* (6) are all decisions having application to married women only. The words on which they depend originate in a different statute and are subject to different canons of construction. If the words "carrying on business" were so wide as to cover a person who merely has trade debts outstanding, there could be no reason for adding the words " personally, or by means " of an agent or manager." But these must have some effect on the construction of the sub-section: see *Brighton Parish Guardians* v. *Strand Union Guardians* (1). If a foreigner abroad had been trading in England and in consequence of his trading owed a debt here, then, on the Crown's argument, he would be carrying on business here so long as his creditor was here; but if his creditor went abroad he would no longer be carrying on business in England. The appellant was not carrying on business in England at the date of the petition or within three months before it.

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(1) [1930] 2 Ch. 211.
(2) (1874) L. R. 10 Ch. 172.
(3) (1882) 20 Ch. D. 697.
(4) [1896] 2 Q. B. 407.
(5) [1901] 1 K. B. 309.
(6) [1915] 2 K. B. 186.

The fifth proposition is that trade debts, in any event, stand on a different footing from excess profits tax liability, irrespective of the question whether a person who merely has trade debts outstanding can, on that account, be described as " carrying on business in England, personally, or by means " of an agent or manager." A person who merely leaves excess profits tax unpaid cannot on that account only come within that description. The Married Women's Property Act was designed to prevent a married woman, who had contracted debts while trading, from subsequently declaring that she had finished trading and that accordingly the debts incurred could not be recovered by bankruptcy process. But constructive trading has gone far enough when it has gone that distance, and it is carrying the principle too far to say that a person is carrying on business when he has left debts which do not fall on him in his capacity as a trader, though they may have a remote connexion with it. The appellant relies on *Smith's Potato Estates Ld.* v. *Bolland* (*Inspector of Taxes*) (2). On the Crown's contention a debtor might cease to carry on business and go abroad, and then subsequently a trading debt might arise in this country by reason of an assessment to excess profits tax.

The sixth proposition is that, even if the appellant is found to be a debtor, it is still necessary for the Crown to show that he has committed an act of bankruptcy within the meaning of this Act and in accordance with the decisions on former statutes in which acts of bankruptcy were described in substantially the same terms as in this Act. An act of bankruptcy, according to these decisions, does not include an act done outside the jurisdiction by a person not British by nationality or domicile, unless that act operates within the jurisdiction. When an important phrase like "act of "bankruptcy" has been the subject of judicial construction, when it occurs in one statute, and the same phrase is incorporated in a later Act, it must be assumed that the legislature intended it to have the same meaning in the new Act. The authorities under the old Act contain expressions clearly treating "debtor" and "act of bankruptcy" as separate concepts, and saying how each was to be construed. In the later Act one of those concepts is referred to in identical language and its meaning must be taken to remain as judicially interpreted. The deliberate alteration of the other concept ("debtor") does not indicate that the concept "act of bankruptcy," which was left untouched, is also to be altered.

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(1) [1891] 2 Q. B. 156, 167.

(2) [1948] A. C. 508, 523, 530.

Sir Frank Soskice K.C. (*S.-G.*), *Sir Andrew Clark K.C.*, *J. H. Stamp* and *Maurice Berkeley* for the Crown. [LORD PORTER intimated that their Lordships wished to hear argument for the Crown on the broad aspect of the case as to the meaning of "carrying on business." One of the aspects of that matter related to the question of excess profits tax.]

The appellant, when the petition was issued, was "a debtor" since at the time he "was carrying on business in England "personally" within s. 1, sub-s. 2 (*c*), of the Act of 1914. (The word "debtor" in that sub-section on its true construction includes a foreigner provided that he has carried on business in England, and therefore includes the debtor here.) Further, being out of England, he remained out of England with intent to defeat or delay his creditors, and so committed an act of bankruptcy within s. 1, sub-s. 1 (*d*), of the Act. A business does not cease to be carried on in this country until all the debts incurred in the course of it have been discharged. That this is the principle to be applied is established by a long series of decisions: *In re Worsley* (1); *In re Clark* (2); *In re Allen* (3); and *In re Reynolds* (4), following *In re Dagnall* (5). The question is whether all the debts of the business have been discharged; and, if they have not, then, even though the shutters may have been put up, the debtor is still carrying it on. One of the things to be done before a business is cleared up is to discharge the taxes incurred in connexion with it, and excess profits tax is such a liability. *In re Allen* (1) demolishes any proposition to the effect that a man cannot be held to be carrying on business unless there is outstanding a debt actually incurred in trading. A business cannot be said to be wound up until excess profits tax is paid. Similarly when under P.A.Y.E. an employer deducts his employees' income tax from their pay, becoming liable to account for it to the Revenue, the fact that this obligation remained undischarged would prevent him from establishing that he had ceased to carry on business. It is not relevant to ask in what capacity the trader has become liable to make the payment: in the case of P.A.Y.E., customs duties or excess profits tax, there is a liability in respect of the business, although it may not be in the strict sense a trade debt. It is artificial not to treat excess profits tax as a trade liability.

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(1) [1901] 1 K. B. 309, 312, 316.

(2) [1914] 3 K. B. 1095, 1104.

(3) [1915] 1 K. B. 285, 287.

(4) [1915] 2 K. B. 186, 188, 191.

(5) [1896] 2 Q. B. 407.

In *Smith's Potato Estates Ld.* v. *Bolland* (*Inspector of Taxes*) (2), relied on by the appellant, a technical question arose as to expenses deductible for the purposes of the Income Tax Acts. But that case is irrelevant because no question arises here as to deductible expenses. That cannot be the test in a bankruptcy matter. Thus, if a manufacturer bought a new machine the cost of which was not deductible for income-tax purposes, the debt would still be one which could be relied on in bankruptcy proceedings. One would not expect a person to be able to escape payment of excess profits tax merely by shutting up shop and leaving his liabilities behind. The situation contended for by the Crown is not artificial but is precisely what one would have expected. It makes no difference when the excess profits tax was assessed: see also the Finance (No. 2) Act, 1939, ss. 12, 18 and 21, and *Whitney* v. *Inland Revenue Commissioners* (3). As to the inclusion in s. 1, sub-s. 2 (*c*), of the words "personally, or by means "of an agent or manager," that indicates that the legislature meant to meet the point raised by the reasoning of Brett L.J. in *Ex parte Blain* (4).

Caplan in reply. An obligation which springs up after the shutters have been put up cannot be said to be incurred in the course of the trade: there must be continuity. There is no liability for excess profits tax until the demand for it is

(1) [1915] 1 K. B. 285.
(2) [1948] A. C. 508.
(3) [1926] A. C. 37, 52.
(4) 12 Ch. D. 522.

made, and here no demand was made while the debtor was in England. Moreover, in no business sense can a person who has ceased trading and only owes excess profits tax be regarded as "carrying on business," and it is in a business sense that those words must be construed. In *Grant* v. *Anderson & Co.* (1) the question arose, on the construction of the words "carrying on business within the jurisdiction," whether the firm there had such a foothold in this country as to give the court jurisdiction, and the court held that it had not. In the Bankruptcy Act, 1914, there was no intention to equate a foreigner with an Englishman in all respects. For example, in the circumstances of the present case the appellant, being a foreigner, could only be made bankrupt in respect of trading debts.

Their Lordships took time for consideration.

Feb. 9, 1950. LORD PORTER. My Lords, by s. 1 of the Bankruptcy Act, 1914, it is provided: "(1.) A debtor commits "an act of bankruptcy in each of the following cases:— "(*a*) If in England or elsewhere he makes a conveyance or "assignment of his property to a trustee or trustees for the "benefit of his creditors generally; (*b*) If in England or "elsewhere he makes a fraudulent conveyance, gift, delivery, "or transfer of his property, or of any part thereof; (*c*) If in "England or elsewhere he makes any conveyance or transfer "of his property or any part thereof, or creates any charge "thereon, which would under this or any other Act be void "as a fraudulent preference if he were adjudged bankrupt; "(*d*) If with intent to defeat or delay his creditors he does "any of the following things, namely, departs out of England, "or being out of England remains out of England, or departs "from his dwelling-house, or otherwise absents himself, or "begins to keep house; . . . . (2.) In this Act, the expression "'a debtor,' unless the context otherwise implies, includes "any person, whether a British subject or not, who at the "time when any act of bankruptcy was done or suffered "by him (*a*) was personally present in England; or "(*b*) ordinarily resided or had a place of residence in England; "or (*c*) was carrying on business in England, personally, or "by means of an agent or manager; or (*d*) was a member "of a firm or partnership which carried on business in "England."

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(1) [1892] 1 Q. B. 108, 111, 115.

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By s. 4, sub-s. 1: "A creditor shall not be entitled to "present a bankruptcy petition against a debtor unless . . . . "(c) the act of bankruptcy on which the petition is grounded "has occurred within three months before the presentation "of the petition, and (d) the debtor is domiciled in England, "or within a year before the date of the presentation of the "petition has ordinarily resided, or had a dwelling-house "or place of business, in England, or (except in the case of "a person domiciled in Scotland or Ireland or a firm or "partnership having its principal place of business in Scotland "or Ireland) has carried on business in England, personally "or by means of an agent or manager, or (except as aforesaid) "is or within the said period has been a member of a firm "or partnership of persons which has carried on business "in England by means of a partner or partners, or an agent "or manager . . . ."

In these circumstances the contention for the Crown is that the appellant has committed an act of bankruptcy because when the petition was issued he was a debtor in that he "was "carrying on business in England, personally" at that time, and that, being out of England, he remained out of England with intent to defeat or delay his creditors and so committed the act of bankruptcy defined in s. 1, sub-s. 1 (d). It is not denied that he is remaining out of England nor that there is prima facie evidence of an attempt to defeat or delay the Crown in its endeavour to collect the debt which is claimed to be due; but the appellant maintains that, being a Rumanian subject, he is not a debtor within the meaning of the Act and that he has not committed an act of bankruptcy, inasmuch as he did not carry on business in England at the date of the petition or during any portion of the three months prior thereto. The respondent maintains that the wording of sub-s. 2 in terms embraces both British subjects and foreigners, provided that either class carried on business in this country at the date of the act of bankruptcy relied upon or within three months prior thereto, and that there is a long series of cases which establish that a business does not cease to be carried on in this country until all the debts incurred in the course of it have been discharged.

As regards the first point, the appellant maintains that, despite its wording, sub-s. 2 has no application save in the case of British subjects or persons domiciled here or in a case where the act of bankruptcy relied upon was committed in this country. In the present case he relies upon the facts that the petition is based upon an allegation that being out of England he has remained abroad, that he is a Rumanian subject, and that the alleged act of bankruptcy by its very nature has not been and could not be committed in this country. It would, he says, be contrary to the comity of nations, and to the ordinary construction of Acts of Parliament, to decide that an act committed out of this country by a foreign national domiciled abroad should be held to come within the mischief of the Act.

Section 4, sub-s. 1, limits the circumstances in which a creditor can present a bankruptcy petition, but I do not think that it throws any further light upon his right to do so. Before it can be presented, there must be a debtor and he must have committed an act of bankruptcy. If those two prerequisites are established, the petition may be issued subject to the conditions laid down in s. 4, sub-s. 1. The answer, therefore, to the question submitted to your Lordships depends in the first instance upon the true meaning of s. 1, sub-ss. 1 (*d*) and 2 (*c*). Interpreted in accordance with its strict wording, the latter sub-section applies to British and foreign nationals alike, and unless some principle to the contrary can be established I should so construe it. If I am right in this an invocation of the comity of nations is irrelevant. If the meaning of an Act of Parliament is ambiguous that doctrine may be prayed in aid, but where an English statute enacts a provision in plain terms no such principle applies. Any foreign nation of which the person affected is a member or with which such person is domiciled is free to disregard the provisions of the English enactment, but the person concerned cannot himself take exception to it, though it may be he will escape from compliance with its terms because he is out of the jurisdiction and cannot be reached by English process. The principle is, I think, accurately expressed in Halsbury's Laws of England (2nd ed.), vol. XXXI, pp. 508-9, paras. 658 and 659, sub tit. "Statutes": "658. There is a presumption "that Parliament does not assert or assume jurisdiction which "goes beyond the limits established by the common consent of "nations. On the principles already stated, however, this pre-"sumption must give way before an intention clearly expressed. "659. Statutes are to be interpreted, provided that their "language admits, so as not to be inconsistent with the comity "of nations. International law, however, being mainly "conventional, can, it seems, only be administered by the "courts when it forms part of the law of this country. If, "therefore, statutory enactments are clearly inconsistent "with international law, they must be so construed, whatever "the effect upon the rights of aliens not within the jurisdiction "may be." Lord Halsbury's observations in *Cooke* v. *The Charles A. Vogeler Co.* (1), are to the same effect.

In considering the authorities it is not, I think, necessary to refer to any case preceding *Ex parte Crispin* (2); but before that and the succeeding cases are considered, and before the statements contained in them are appraised, it is essential to bear in mind what the relevant statutory provisions were at the time when they were decided. In *Crispin's* case (2) the statute applicable was the Bankruptcy Act, 1869, and that case in terms decided only that "an alien non-trader "domiciled abroad, who contracts debts in England . . . . "cannot be made a bankrupt upon an alleged act of bankruptcy "committed abroad." In the course of his judgment, however, Mellish L.J. laid down three considerations as supporting the conclusion at which he had arrived (3). The first two referred to wording which is similar to that which is now to be found in s. 1, sub-s. 1 (*a*), (*b*) and (*d*) of the present Act: (*a*), he says, is "clearly intended to relate to a conveyance "which is to operate according to English law"; (*b*) "clearly "means . . . . fraudulent by the law of England" and (*d*) implies "that the person who remains out of England, "has his home or place of business in England, and cannot "reasonably be held to apply to the case of a foreigner "remaining in his own home." In ascertaining the effect of this case, however, it has to be borne in mind that the Act of 1869 contained no definition of the word debtor, and the court, being unable to find any intermediate meaning for that word between any debtor, whatever his nationality or domicile, who commits an act of bankruptcy anywhere, and a debtor who commits an act of bankruptcy in this country or is otherwise subject to the law of this country, chose the latter. The act of bankruptcy alleged was the going or remaining out of England with intent to defeat or delay creditors, and the headnote is, I think, accurate in saying: "An alien "non-trader domiciled abroad, who contracts debts in

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(1) [1901] A. C. 103, 107.
(2) L. R. 8 Ch. 374.
(3) Ibid. 380.

"England, is liable to be made a bankrupt under the "Bankruptcy Act, 1869, if he commits an act of bankruptcy "in England, although he may have left England before the "petition for adjudication is presented. But he cannot be made "a bankrupt upon an alleged act of bankruptcy committed "abroad." This language indeed but repeats the observations of the court (1).

Ex parte Blain (2) was also decided under the Act of 1869, and in it the court held (1.) that an act of bankruptcy must be a personal act or default and cannot be committed through an agent nor by a firm as such, and (2.) that, to use the words of Brett L.J. (3): "Upon the ground of the limited power "of the legislature of England to legislate, all the authorities "have held that it is necessary that the act of bankruptcy "should have been committed in England, if the person "against whom the statute is invoked is a foreigner who is "not domiciled in England." In that case the persons against whom the petition was presented and by order discharged were Chilean subjects who had never been in this country, though they were members of a firm carrying on business here. Undoubtedly the subsequent Bankruptcy Acts have altered the first principle decided; whether they have altered the second is the matter for your Lordships' consideration. The Act of 1883, like the Act of 1869, contains no definition of debtor, though it increases the number of acts which are acts of bankruptcy. It does, however, contain a fresh section—s. 6—which enacts that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless—s. 6, sub-s. 1 (*d*)—the debtor is domiciled in England or, within a year before the date of the presentation of the petition, he ordinarily resided in or had a dwelling-house or place of business in England.

In *In re Pearson* (4) an American citizen who was resident in America but was said to have carried on business in England within a year was served with a bankruptcy notice in America, and it was sought to make him bankrupt thereon. The court held that s. 6, sub-s. 1 (*d*), made no difference in the law: it did not enlarge the class of debtors but only limited the cases in which a bankruptcy petition could be presented. At the same time it affirmed the principle laid down in *Ex parte Blain* (5), Fry L.J. saying (6): "I can entertain no doubt

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(1) L. R. 8 Ch. 374, 379.
(2) 12 Ch. D. 522.
(3) Ibid. 528.
(4) [1892] 2 Q. B. 263.
(5) 12 Ch. D. 522.
(6) [1892] 2 Q. B. 263, 268.

"that s. 4 of the Act of 1883 relates only to debtors who "are subject, either by birth and natural allegiance or by "temporary residence, to English law."

Cooke v. *The Charles A. Vogeler Co.* (1) raised a somewhat different question. In that case two American subjects resided and carried on business in America, but they also carried on a branch of their business in this country and had assets here. In December, 1899, they executed an assignment of all their property to their manager in America in trust to pay their debts. This was said to be an act of bankruptcy under s. 4, sub-s. 1 (*a*), of the Act of 1883, which is in the same terms as s. 4, sub-s. 1 (*a*), of the Act of 1914. They had, it was argued, "in England or elsewhere made a conveyance ". . . . of their property to a trustee . . . . for the benefit "of their creditors generally." The contention failed. Lord Halsbury L. C. said (2): "The words 'debtor' and 'creditor' "certainly cannot be sufficient to give jurisdiction to the "English Court of Bankruptcy, because if unlimited they would "give jurisdiction all over the world in respect of debts, "petitions, or acts of bankruptcy committed anywhere . . . . "Once it is admitted that a limit must be placed upon those "words, it must follow that the limit must be 'debtor' and "'creditor' respectively who are subject to the jurisdiction "of the English bankruptcy law." Later he added (2): "The whole argument, I think, depended upon the generality "of the word 'debtor'." Lord Davey, who also spoke, affirmed the decision in *In re Pearson* (3) to the effect that s. 6 was a limiting and not an enlarging section and had not altered the law in this respect.

In these cases no question arose as to the effect of the change in the law brought about by the description of debtor which was inserted for the first time in s. 8 of the Bankruptcy and Deeds of Arrangement Act, 1913, and repeated in s. 1, sub-s. 2, of the Act of 1914; but some discussion as to its effect took place in 1936 in *In re Debtors* (*No.* 836 *of* 1935) (4). The problem in that case was the same as that in *Cooke* v. *The Charles A. Vogeler Co.* (1). Two American citizens carried on a financial business in partnership in a number of foreign cities including London and Paris, the London business being managed by an Englishman. In 1935 the London business was wound up and its assets applied, so far as they went, in settlement of English claims. At this time both partners were living in America, and in August of that year, they executed in the State of New York an assignment of their property to trustees for the benefit of their creditors, an assignment which in the case of one partner comprised the whole of his property. Against that partner the petitioning creditor relied upon the execution of the assignment as an act of bankruptcy.

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(1) [1901] A. C. 102.
(2) Ibid. 108.
(3) [1892] 2 Q. B. 263.
(4) [1936] Ch. 622.

The Court of Appeal, following *Cooke* v. *The Charles A. Vogeler Co.* (1), held that an assignment executed abroad by a foreign national not domiciled or resident in England, did not constitute an act of bankruptcy unless it was intended to operate in accordance with English law. The court considered itself bound by the decision in *Cooke* v. *The Charles A. Vogeler Co.* (1) in spite of the fact that the Act of 1914 had added a definition of or additional meaning to the word "debtor." In the opinion of the members of the Court of Appeal, *Cooke* v. *The Charles A. Vogeler Co.* (1) was decided on two grounds: (1.) that the person petitioned against was not a debtor, and (2.) that the assignment was not an act of bankruptcy. As regards the first point, the court were inclined to think that the provisions of the Act of 1914 had disposed of the difficulty and that the American gentleman who was petitioned against was a debtor. But in their opinion the House of Lords had also decided that a deed of assignment or conveyance executed by a domiciled foreigner in his own country is not an act of bankruptcy within the meaning of the Bankruptcy Acts if it is to operate according to the law of the foreign country in which it is made. Whatever view one may take of this decision, it has no direct bearing on the question now under consideration. It is a decision upon the terms of s. 1, sub-s. 1 (*a*) not s. 1, sub-s. 1 (*d*), and deals with the limitation to be placed on the meaning of the word conveyance, not with the width of that class of persons who are included in the word debtor.

The appellant, however, relies on the fact that the provisions of s. 1, sub-s. 2, are not definitive: i.e., they do not say what a debtor is but merely add a fresh type or fresh types to those who have been held in law to constitute the category of debtors, and therefore leave it still necessary to put some limit upon so wide a class. Let me assume then, without expressing any opinion as to the validity of the contention, that the sub-section should read: "In addition to one who is already subject "to the English bankruptcy law, the word 'debtor' shall "also embrace a non-British subject who, at the time when "the act of bankruptcy was committed, was carrying on "business in England." On this wording, if the appellant was carrying on business in England when he failed to pay his debt to the Crown, he would, prima facie, be a debtor, since, as a result of the wording of the section, it is immaterial that he was not a British subject, and from the terms of sub-sub-s. 2 (*b*) it is clear that residence is only one of four alternative requisites which constitute a debtor within the meaning of the Act: residence may be a factor which brings him within that class, but it is not a necessary element. Whatever limitation may formerly have been put on the meaning of the word "debtor," a wider sense has now been given to it: it includes not only persons who were in the past subject to the English bankruptcy law, but a new class consisting of persons who are not British subjects or domiciled in this country but carried on business in England at the time when the act of bankruptcy was committed.

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(1) [1901] A. C. 102.

Whether *In re Debtors* (*No.* 836 *of* 1935) (1) was rightly decided or not, one still has to construe sub-s. 1 (*d*), and I find it difficult to see what bearing a narrowed construction of the word "conveyance" in s. 1, sub-s. 1 (*a*), has upon the width of the class of debtors who can commit the act of bankruptcy defined in s. 1, sub-s. 1 (*d*). As Lord Greene M.R. points out (2), an act within sub-s. 1 (*d*) can only be committed by someone abroad. That person must of course have been carrying on business in England within three months of the act of bankruptcy alleged, and the factors needed to fulfil this condition will require analysis at a later stage; but, once it is established that these requirements are fulfilled, the sub-section declares in terms that it does not matter whether the person concerned is a British subject or not; he is a debtor provided that he fulfils any one of the four conditions stipulated for in the sub-section. In seeking to say that the provisions are confined to a British national or British domiciled person or to a case where the act of bankruptcy is committed in this country, the appellant seems to me to give the go-by to the words "whether a British subject or not," and I do not understand what extension of the law he suggests to have been intended by them unless his contention is that

(1) [1936] Ch. 622.

(2) (1948) 64 T. L. R. 446, 447.

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they apply to some of the acts of bankruptcy set out above, but not to all—at any rate not to the one relied upon in this case. I cannot find that the wording of the Act makes any such differentiation between what is required to constitute one category of those whom the present Act declares to be included in the class of debtors and another, and I can see no reason for its implication.

Out of respect for a strenuous argument presented to your Lordships, I have dealt at some length with this aspect of the case, but in the end I find myself coming back to the judgment of the Master of the Rolls and find myself in complete agreement with its expression and substance. Like him I think the point disposed of if one reads the relevant words of the statute in their appropriate position (1). I repeat them as a convenient method of winding up the view I hold on this question. Section 1, sub-s. 1 (*d*), will then run : " Any person, " whether a British subject or not, who, at the time when " any act of bankruptcy was done or suffered by him, was " carrying on business in England, commits an act of bank- " ruptcy if, with intent to defeat or delay his creditors, being " out of England, he remains out of England." So reading the sub-section, I find it impossible to add as a limitation the provision that no foreigner is hit by the Act unless he in some way owes allegiance to the law of England or the act has been committed in this country. To adopt this construction is not to limit the meaning of the wording of the section but to contradict it.

But the further argument still remains open to the appellant that he was not carrying on business in England within three months of the presentation of the petition and therefore was not a debtor within the meaning of the Act. In a sense it is true that the appellant was not actively carrying on business within three months of the presentation of the petition, but there is a series of cases beginning with *In re Dagnall* (2) and ending with *In re Reynolds* (3) which in unbroken sequence have decided that trading does not cease when, as the expression is, " the shutters are put up," but continues until the sums due are collected and all debts paid. It is true that all the decisions have been given in respect of married women's trading and that a distinction has been made between the earlier Acts where the expression was

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(1) 64 T. L. R. 446, 447.

(2) [1896] 2 Q. B. 407.

(3) [1915] 2 K. B. 186.

"as a trader" and the later where the phrase "carrying "on trade" is found. But it is the later, not the earlier, phrase which has been adopted in the Act of 1914.

It was suggested on behalf of the appellant that the decisions had application to married women only, because the wording was first used in the Married Women's Property Act, 1882, s. 1, sub-s. 5, and transferred therefrom to the Bankruptcy and Deeds of Arrangement Act, 1913, and thence to the present Act. I cannot follow why the same wording should have one significance when employed of married women and another in the case of all other persons engaged in trade. More particularly I think that the meaning placed upon the words in the cases referred to must be followed when it is remembered that two Acts of Parliament have been passed since *In re Dagnall* (1) and *In re Worsley* (2) were decided, and that those cases have been followed and approved in *In re Clark* (3), *In re Allen* (4), and *In re Reynolds* (5). In my opinion those cases were rightly decided and are conclusive of the present question.

There is, however, one further matter which requires consideration. In all the cases referred to, the debts which were to be paid or collected were strictly trade debts, and it is maintained that in that respect they differ from the case under appeal in that the debt claimed by the Crown to be due is in respect of excess profits tax and that such a debt is not a trade debt but a sum due for taxes and no more connected with the appellant's business than income tax or any other tax liability. Whatever else may be said about excess profits tax, however, it is imposed upon the debtor because he has been trading, and I do not see any reason for confining trade debts to those incurred in buying or selling. *In re Allen* (6) shows that they extend to liabilities incurred in incidental matters which occur during the course of carrying on the trade, including a liability for the careless driving of a servant resulting in an accident. In *Dagnall's* case (7) Vaughan Williams L.J. said: "It seems to me that trading is not "completed until you have performed all the obligations "that the fact of trading imposed upon you"; and this language was quoted with approval by Swinfen Eady L.J. in

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(1) [1896] 2 Q. B. 407.
(2) [1901] 1 K. B. 309.
(3) [1914] 3 K. B. 1095.
(4) [1915] 1 K. B. 285.
(5) [1915] 2 K. B. 186.
(6) [1915] 1 K. B. 285.
(7) [1896] 2 Q. B. 407, 410–1.

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In re Reynolds (1). I think it is accurate, and that the payment of excess profits tax was one of the obligations imposed on the appellant by his trading.

I would dismiss the appeal with costs.

LORD NORMAND. My Lords, I concur in the opinion of my noble and learned friend on the woolsack.

LORD MORTON OF HENRYTON. My Lords, I also concur.

LORD REID. My Lords, I also concur.

LORD RADCLIFFE. My Lords, I have nothing to say in this appeal except that I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *William Foux & Co.; Solicitor of Inland Revenue.*

(1) [1915] 2 K. B. 186, 191.

[PRIVY COUNCIL]

J. C.*

1949

Dec. 16.

1950

Feb. 28.

Distinguished.
[1952] A.C.

CYRIL WAUGH . . . . . APPELLANT;

AND

THE KING . . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL, JAMAICA.

Jamaica—Criminal law—Charge of murder—Misdirection—Comment on failure of accused person to give evidence—Incomplete dying declaration—Admissibility—Costs.

At the trial of the appellant on a charge of murder a dying declaration of the deceased was inadmissible because on its face it was incomplete—the deceased, while making the statement, having fallen into a coma from which he never recovered—and

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**Present:* LORD GREENE, LORD OAKSEY, LORD RADCLIFFE and SIR MADHAVAN NAIR.

no one could tell what he was about to add. It was a serious error to have admitted it in part, as was done—without the last unfinished sentence—and an even more serious error not to have pointed out to the jury that it had not been subject to cross-examination.

Taylor on Evidence, 12th ed., paras. 721 and 722, and the cases there cited; Phipson on Evidence, 7th ed., p. 310; and *Ashton's* case (1837) 2 Lewin C. C. 147, referred to.

Observations on the care to be taken by a judge in commenting on the fact that a prisoner has not given evidence.

The appellant, whose conviction by the Supreme Court of Jamaica was quashed, was in the circumstances awarded the costs of the appeal.

APPEAL (No. 23 of 1949), by special leave, from the conviction and sentence of death passed on the appellant, Cyril Waugh, by the Supreme Court of Jamaica (March 1, 1949) for the murder on October 25, 1948, of Phillip Newby, and from the judgment of the Court of Appeal, Jamaica (April 4, 1949) refusing the appellant leave to appeal against his conviction and sentence.

The following facts are taken from the judgment of the Judicial Committee: The appellant, Cyril Waugh, was a ranger employed by the Richmond Estate in St. Ann, Jamaica, and one of his duties was to patrol the estate with a gun supplied by the proprietors in order to protect the coconuts from thieves. On October 25, 1948, at about 4.15 p.m., two neighbours, Thomas Ridley and Seaford Tait, heard a single shot fired in the plantation, and the appellant's voice calling for help. Ridley was the first to reach the spot, where the appellant was found holding a gun. Ridley asked the appellant what was wrong, and the appellant informed him that he had found a man identified by his description as Phillip Newby with a bag of coconuts; that when challenged Newby dropped the coconuts and threw an iron tool used for husking the nuts at the appellant, but missed him; and that he then attacked him with a machete or cutlass, whereupon the appellant fired. In reply to Ridley's further question the appellant said, "I believe he got the bullet somewhere on "his foot, and has gone in the direction of the gully." Ridley saw the bag of coconuts and, at a little distance, the iron tool on the ground. His story was confirmed by Tait, who saw the bag lying on the ground, and the iron tool in the appellant's hand. According to Tait the appellant said to him that "the man was resisting against him with a cutlass "to cut him and he shoot him," and showed the direction in which the man ran. Those two witnesses were led by blood tracks through the plantation to the other side of a gully, where they found Phillip Newby gravely wounded in the lower part of the abdomen and genitals.

When the police arrived the appellant repeated his story and pointed out the relevant positions of himself and Newby; and a map was subsequently prepared on the information given by him. Later that evening the appellant made a further statement to the police at the police station in the following terms: "I am a ranger employed to the Richmond "Estate in St. Ann and I live on the property. My postal "address is Laughlands. I live three miles from St. Ann's "Bay, I knew Phillip Newby by sight but not his name. "I always saw him working at Richmond Estate after the "crop working in the field. On Monday, October 25, 1948, "about 4.15 p.m., I was patrolling alone on a portion of the "property known as Fig Tree Bay with the single barrel "cartridge gun belonging to the estate. This section is by "the sea-side. On arriving at this section I saw a man "carrying a crocus bag with something in it over his left "shoulder and a cutlass under his left arm and a piece of iron "in his right hand. That was in the coconut plantation and "he was coming from the inner part of the property towards "the sea-shore. When I first saw him he was about 8 yards "from me. A young almond tree was between us and that "is why I didn't see him before. I recognized his face to be "the man I always saw working on the estate, and whom "I got to know later to be Phillip Newby. I called to him "saying 'Its you taking away the coconuts from down here?' "As I said that to him he fling the piece of iron at me that "he had in his right hand. He was then about 7 feet from me. "The iron didn't catch me. He then drew his machete from "under his arm, dropped the bag and started to approach me "with the machete raised in his hand. I stepped back and "said to him 'stop.' I raised the gun but he didn't stop "and I fired one shot at him. He turned and started to run "inwards the property towards the river. I ran after him "and bawled out 'help, help' several times. I chased him "for about 2½ chains in some tall grass and I noticed blood-"stains along the path he was running. As I saw the blood "I turned back to the bag and then about three minutes "after I saw Thomas Ridley and Seaford Tait coming. Shortly

bag made of
closely interwoven
string.

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" after I saw Leslie Trench, known as Trenchie, come on the " scene. No one was present when the incident between us " took place. I showed them where Newby ran and the blood- " stains on the grass along the path. A crowd came on the " scene, and I took the bag and contents, which I found was " coconuts, and the iron to my house, I didn't find the machete. " He had run with it. Shortly after the police came and " I showed them the bag with coconuts and the iron Newby " was carrying and told them of the incident. I then took " the police back to the spot and along the path Newby ran. " By that time Newby had been taken away to the hospital " so I didn't see him. I then went to the St. Ann's Bay " Police Station and gave this statement which was read " over to me and which is correct."

Newby was not unconscious when he was found, but at the hospital in the night his condition became grave, and at his own request a statement made by him in the presence of the doctor was taken down by the police. That statement was as follows: " I got shot innocently. I was going to bathe " going from Llandovery direction and about ½ chain from " the sea-side and just about to take off my clothes behind " a grass root. I saw a man approach with a gun and he " shoot me innocently, and the man say that anybody he " saw down there he is going to shoot because they are " stealing coconuts down there. I was not carrying any bag " with coconuts. I was not carrying any iron, not even " a pocket-knife. After I shot I feel it, when I feel the shot " I try to run because the man say he was going to shoot me. " When he fire the shot he missed the other man. The man " has an old grudge for me simply because . . . ." At that point Newby fell into a coma from which he never recovered.

The police authorities, accepting the appellant's explanation, decided not to prosecute him, but the coroner magistrate on November 10, 1948, ordered a prosecution. After receipt of that order the appellant was put on trial in the Supreme Court of Judicature before McGregor J. and a jury. The jury at first disagreed, but subsequently returned a verdict of " Guilty with mercy." The judge thereupon sentenced the appellant to death.

The appellant applied for leave to appeal to the Court of Appeal, Jamaica, under s. 15, c. 431 of the Laws of Jamaica, but leave was refused. Special leave to appeal to His Majesty in Council was granted on July 28, 1949.

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CYRIL WAUGH *v.* THE KING.

1949. Dec. 15, 16. *Casswell K.C.* and *Pullan* for the appellant. The defence of the appellant was that he had come on Newby carrying a bag of stolen coconuts, and, on being attacked by him with a cutlass, had fired a shot in self-defence. It is submitted that the only evidence against the appellant was the dying declaration of Newby, which was self-contradictory and inconsistent with the circumstantial evidence and wholly unreliable; that the rest of the evidence for the prosecution was really evidence for the defence; that in the circumstances the case ought not to have been left to the jury; and that if it was to be so left the judge should have warned them most solemnly and seriously of the danger of accepting a dying declaration.

Further, on his counsel's advice the appellant did not give evidence, although quite prepared to do so, and the judge in the course of his summing-up referred on no less than nine occasions to the absence of the accused from the witness box, and in effect treated his failure to give evidence as corroboration of the dying declaration.

Lastly, the judge was in error in that he did not leave manslaughter to the jury—he told them that it was murder or acquittal. There are a number of cases to the effect that a judge should be very careful when he refers to the absence of an accused person from the box; and if the evidence is not strong against him there is no reason why he should go into the box: *Kops* v. *The Queen; Ex parte Kops* (1); *Reg.* v. *Rhodes* (2); *Rex* v. *Corrie and Watson* (3).

It is almost impossible to see how the jury could have found the appellant guilty unless they thought that his absence from the box proved his guilt in some way or another. Applying what was said in *Tumahole Bereng* v. *The King* (4) to the facts of the present case, there is really no evidence against the appellant—nothing that he is called upon to answer. On the question of the weight to be given to a dying declaration see *Ashton's* case (5). What was there said is just as true to-day. [Reference was also made to *Reg.* v. *Jenkins* (6) and *Rex* v. *Woodcock* (7).] The trial judge, having decided to admit this dying declaration, should not have left it to the

(1) [1894] A. C. 650, 652.
(2) [1899] 1. Q. B. 77, 83.
(3) (1904) 68 J. P. 294, 297.
(4) [1949] A. C. 253, 270.
(5) (1837) 2 Lewin C. C. 147.
(6) (1869) L. R. 1 C. C. R. 187, 193.
(7) (1789) 1 Leach 500.

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jury without due warning not only that it was contradictory in itself and inconsistent with a considerable amount of the circumstancial evidence, but that it was not made on oath or subject to cross-examination. Further, it has been held that a dying declaration which is not complete should not be admitted in evidence ; here the deceased lapsed into a coma, from which he never recovered, before his statement was completed : Taylor on Evidence, 12th ed., para. 721.

Pullan followed. The judge's reference to the absence of the appellant from the box went far beyond mere comment on his absence ; the judge made the omission to give evidence a substantial part of the case for the prosecution, and in so doing offended against not only the spirit, but also the letter, of the law, for s. 9 of c. 468 of the Laws of Jamaica provides that " (*b*) the failure of any person charged with an offence " . . . . to give evidence, shall not be made the subject of " any comment by the prosecution."

Gahan for the Crown [after referring to *Renouf* v. *Attorney-General for Jersey* (1) for the general rules on which the Board acts in criminal matters]. As to the effect of the prosecution's putting in statements made by the prisoner, it was said in *Rex* v. *Higgins* (2) that " what a prisoner says is not evidence, " unless the prosecutor chooses to make it so, by using it as " part of his case against the prisoner, however, if the prosecutor " makes a prisoner's declaration evidence, it then becomes " evidence for the prisoner, as well as against him ; but still, " like all evidence given in any case, it is for you to say whether " you believe it." There are other cases to the same effect. The position is that it is evidence, not merely that such a statement was made, but of the facts contained in the statement ; but, like other evidence, it is for the jury, in considering all the circumstances, to weigh that evidence and to say how much or how little they believe.

As for the law of Jamaica, if it is found that A. has killed B., and he alleges as a justification only an attack on him with a cutlass, it is for the jury to consider on the available evidence whether that attack took place ; and if there was material on which the jury could find that such an attack was very unlikely—if they did not believe that B. had a cutlass—then there would be a very strong case to go to the jury. There is evidence in the present case of a very considerable search for the missing cutlass and of the fact that no cutlass had been

(1) [1936] A. C. 445; 475.

(2) (1829) 3 Car. & P. 603, 604.

found. The only evidence of the deceased's having been in possession of a cutlass was in respect of some months previously. If there was no cutlass the plea of self-defence could hardly be established.

With regard to the continued comment by the judge on the failure of the appellant to give evidence, he certainly was entitled to make such comment; his right cannot be otherwise than to point out to the jury something which it may be material for them to consider, and there is nothing wrong in repeating a relevant matter. Each of the passages of the judge was on a matter which justified comment.

Further, the Court of Appeal in Jamaica has power to hear evidence, and after counsel had realized the comment that had been made on the failure of the appellant to give evidence there was no application, even, to the Court of Appeal to hear evidence.

Lastly, it was suggested for the appellant that the whole of the dying statement should have been excluded, and should not have been allowed in without the incomplete sentence. Great difficulty results if the test of admissibility is the completeness of a statement. A statement of fact made by a dying person is clearly evidence if it is in relation to the death of that person. The weight to be put on it is an entirely different matter, and is for the jury. The summing-up was proper and adequate, and the jury were entitled on the evidence to draw the inference that the appellant had not acted in self-defence.

A reply was not required.

Casswell K.C. It is submitted that this is a case in which the Board might modify its usual practice and say that the costs of the appellant should be allowed. [Reference was made to *Parashuram Detaram Shamdasani* v. *King Emperor* (1).]

Gahan. The practice of not allowing costs in a criminal case is of very long standing, and it is only in very exceptional cases that costs are awarded. Apart from the authority cited for the appellant *Renouf's* case (2), which was a contempt case, there only appears to be one case in which costs were awarded, and that was where a petitioner had sought to appeal against a small fine and the Board made an order for costs. The present is not a case where the Board should depart from its usual practice.

(1) (1945) L. R. 72 I. A. 189. (2) [1936] A. C. 445, 475.

1949. Dec. 16. LORD GREENE announced that their Lordships would humbly advise His Majesty that the appeal should be allowed, that the appellant should have the costs of the appeal, and that they would give their reasons later.

1950. Feb. 28. LORD OAKSEY, delivering the reasons for their Lordships' report, stated the facts set out above and continued : At the trial the prosecution put in the statements made by the prisoner to the police, and called Ridley and Tait who gave the evidence above stated. They also produced a surveyor to prove a map prepared mainly on the information given by the prisoner as checked by the police, and the Government chemist to prove that the shot was fired at a distance of from two to three feet. They also produced formal evidence as to the clothing of the deceased, and medical evidence as to the cause of death. The only other evidence produced by the prosecution was the dying statement of the deceased. Counsel for the defence objected to the admission of this dying statement on the ground that it was incomplete, but the judge ruled that it was admissible except for the unfinished sentence.

In his summing-up the judge emphasized the importance of a dying statement, and directed the attention of the jury to the fact that the appellant did not give evidence on oath. At the very outset he blamed the police for not prosecuting in the first instance. He said : " It seems quite clear that " until the papers reached the Resident Magistrate as coroner " for this parish the police seem to have considered, ' Oh here " ' is a thief, a coconut thief, who has got his deserts, let us " ' get rid of it in the easiest possible way.' How such an " idea could have remained in the minds of any responsible " officer, any officer of experience, after they had read that " statement which the deceased gave on the night that he " was shot, I do not know." He proceeds : " You have got " to adjudicate this case, I may almost say, on unsworn " statements. Two men were present at the time, one has " since died, and the other has not seen fit to go into that " witness-box and tell you what happened. He is relying " on statements which he made from memory afterwards, " and has not seen fit to go there in the witness-box and say, " ' the statement that I gave is true word for word, and I stand " ' up here and submit myself to cross-examination to have " ' my story tested.' He has not done it. Why not ? You "are entitled to ask yourselves that. Two persons were "present; one is dead and the other is in the dock and he "does not tell you his story."

At eight other places in the summing-up reference is made to the failure of the appellant to give evidence. For example, in dealing with the doctor's evidence as to the direction of the shot, the judge said, "But as I have said before, the "prisoner has not told you how it happened. You have "not been able to ask him one question; the one person "who is alive to day to tell us what happened, does not see "fit to go there (pointing to the witness-box) and tell you "what happened." On the other hand, dealing with the dying statement, the judge impressed on the jury the value of such a statement made in the certainty of death, and failed entirely to point out that it is clearly designed as a defence of the injured man against the allegation that he was stealing coconuts, and that the reference to a third person missed by the shot is almost unintelligible in view of the fact that the shot was fired at the deceased at point-blank range.

Counsel for the appellant contended before their Lordships' Board that there has been in this case a grave miscarriage of justice by reason of the judge's comments on the appellant's absence from the witness-box, by the admission of the unfinished dying declaration of the deceased, by the failure to warn the jury of the danger of accepting a dying declaration as equivalent to sworn evidence on which the witness might have been cross-examined, and by other misdirections.

The law of Jamaica is the same as the law of England both as to the right of a judge to comment on a prisoner's not giving evidence and as to dying declarations. Whilst much of the summing-up is unexceptionable, there are certain parts of it which, in their Lordships' view, do constitute a grave departure from the rules that justice requires, and they are therefore of opinion that the conviction must be quashed. It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment. Here the appellant had told the same story almost immediately after the shooting, and his statements to the prosecution witnesses and his statement to the police made the same day were put in evidence by the prosecution. Moreover, his story was corroborated by the finding of the bag of coconuts and the iron tool and by the independent evidence as to the place where the shooting took place. In such a state of the evidence the judge's repeated comments on the appellant's failure to give evidence may well have led the jury to think that no innocent man could have taken such a course. The question whether a prisoner is to be called as a witness in such circumstances and on a murder charge is always one of the greatest anxiety for the prisoner's legal advisers, but in the present case their Lordships think that the prisoner's counsel was fully justified in not calling the prisoner, and that the judge, if he made any comment on the matter at all, ought at least to have pointed out to the jury that the prisoner was not bound to give evidence and that it was for the prosecution to make out the case beyond reasonable doubt.

Apart, however, from this question, their Lordships are of opinion that the dying declaration was inadmissible because on its face it was incomplete and no one can tell what the deceased was about to add; that it was in any event a serious error to admit it in part; and that it was a further and even more serious error not to point out to the jury that it had not been subject to cross-examination: see Taylor on Evidence, 12th ed., paras. 721 and 722, and the cases there cited, Phipson on Evidence, 7th ed., p. 310, and *Ashton's* case (1). It was also a misdirection to tell the jury that there was no evidence as to the place of the shooting except the dying declaration and the appellant's statements. There was in fact the evidence of the prosecution's witnesses Ridley, Tait and Sergeant Wright, which demonstrated the falsity of the dying declaration on this point. It was also improper to tell the jury that the bag of coconuts and the iron might have been mentioned to the deceased by the prosecution witnesses when those witnesses had been asked no questions on the subject. The only admissible evidence which in any way told against the appellant's account was the fact that the cutlass was not found; but as this might easily have become hidden in the long grass, or among the canes, or in the gully, it was not a matter on which much reliance could be placed.

For all these reasons their Lordships are of opinion that the conviction must be quashed, and they have humbly advised

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(1) 2 Lewin C. C. 147.

His Majesty accordingly. In all the circumstances of the case they think that the appellant ought to have the costs of the appeal.

Solicitors: *Hutchison and Cuff; Burchells.*

[PRIVY COUNCIL]

J. C.*
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Feb. 28.

EXECUTORS OF THE WILL OF THE HONOURABLE PATRICK BURNS, DECD., AND OTHERS . . . . APPELLANTS;

AND

MINISTER OF NATIONAL REVENUE . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Revenue—Income tax—Exemption—Trust estate—Direction to accumulate surplus income to capital account—Ultimate payment of income of accumulated fund to named beneficiaries—Valid charitable gift—Accumulated surplus income never " income " of beneficiaries —" For the benefit of " ascertained and " unascertained " persons—Absence of charging provision—Income War Tax Act, R. S. C. 1927, *c.* 97 (*as amended to* 1941), *s.* 4 (*e*) ; *s.* 11, *sub-ss.* 2, 4 (*a*), (*c*).

In each of the years 1938 to 1941, inclusive, the appellant executors, as directed by the will of the testator, paid out of the income of his " trust estate " certain fixed annuities, distributed sixty per cent. of the balance among named nephews and nieces, and transferred the surplus forty per cent. for accumulation to capital account. Sixty-seven per cent. of that surplus forty per cent. was ultimately divisible under the will between the nephews and nieces, and the remaining thirty-three per cent. was ultimately payable to a trust company which was directed by the will to distribute annually as trustee the net income therefrom in equal shares among five named bodies—the added appellants—the gifts in whose favour were later declared by the court to be valid charitable gifts.

Held, that, during the years in question, 1938 to 1941, the recipients of the thirty-three per cent. of the surplus income were the executors, whose duty it was to accumulate it and ultimately to hand it over to the trust company, which would receive

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**Present:* Lord Greene, Lord Simonds, Lord Normand, Lord Morton of Henryton and Lord Radcliffe.

J. C.

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EXECUTORS OF THE WILL OF THE HON. PATRICK BURNS, DECD. *v.* MINISTER OF NATIONAL REVENUE.

it not as income but as a capital fund which would always remain capital in its hands; that all that the five named bodies would receive would be the income of that capital fund; and that accordingly the thirty-three per cent. of the surplus received by the executors or the capital fund to be received by the trust company would never in any sense or at any time be the "income" of the five named bodies, and therefore was not exempt from income tax under s. 4 (*e*) of the Income War Tax Act, R. S. C. 1927, c. 97.

Held, secondly, that the expression "for the benefit of" in s. 11, sub-s. 2, of the Act, which provides that "income accumulating in trust for the benefit of unascertained persons . . . . shall be taxable in the hands of the trustee . . . ." was wide enough to cover the case where the unascertained persons would receive an interest in the income to be derived from the fund built up from the accumulating income, and that accordingly, since the income to be derived from that proportion of the accumulating income which would ultimately be handed over to the trust company for the benefit of three of the named bodies would in fact be the income of unascertained persons, that proportion of the accumulating income—three-fifths—was chargeable to tax under s. 11, sub-s. 2, which was admittedly a charging section.

Minister of National Revenue v. *Trusts and Guarantee Co.* [1940] A. C. 138, at 148, referred to.

The remaining two of the five bodies being ascertained persons for whose benefit the income was accumulating, there was no relevant charging section in the Act which applied to that proportion—two-fifths of the thirty-three per cent.—for the years 1938, 1939 and 1940, which was therefore exempt from taxation for those years.

By virtue of the addition in 1941 of para. (*c*) to s. 11, sub-s. 4, however, that sub-section was turned into a valid charging provision, and accordingly the whole surplus income in question—the thirty-three per cent.—was liable to tax in 1941.

Judgment of the Supreme Court of Canada [1947] S. C. R. 132, varied.

APPEAL (No. 52 of 1947), by special leave, from a judgment of the Supreme Court of Canada (October 22, 1946) allowing in part the appellants' appeal from a judgment of the Exchequer Court of Canada (January 9, 1946) which had dismissed an appeal from the decision of the Minister of National Revenue affirming the assessments for income tax made on the executor appellants under the Income War Tax Act, R. S. C. 1927, c. 97, as amended, for the taxation years 1938, 1939, 1940 and 1941.

The question for determination on the appeal was whether or not or to what extent under the Income War Tax Act liability for income tax arose in respect of that part of the income of the trust estate of the Hon. Patrick Burns, decd., during the taxation years 1938 to 1941, inclusive, which, in the event of its not being required to meet annuities or other charges would, on the death of certain persons, be payable to the Royal Trust Company for the creation and establishment of a trust, to be known as the Burns Memorial Trust, to be administered by the Royal Trust Company as trustee for the benefit of five named bodies.

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

Two of the judges in the Supreme Court (Rand and Estey JJ.) would have allowed the appeal in respect of the years 1938, 1939 and 1940 in its entirety, but the majority (Rinfret C.J., Kerwin and Hudson JJ.) held that the appeal succeeded only as to two-fifths of the amount in controversy in respect of the years 1938 and 1939. All the judges held that the appeal failed in respect of the year 1941.

1950. Jan. 23, 24, 25. *H. G. Nolan K.C.* (Canadian Bar), *S. G. Dixon K.C.* (Canadian Bar) and *Gahan* for the appellants.

S. G. Dixon K.C. In each of the years 1938 to 1941, inclusive, the executor appellants rendered income-tax returns which showed that thirty-three per cent. of forty per cent. of the net revenue was in their opinion exempt from tax on the ground that that figure had accrued to the credit of ascertained beneficiaries. In the four years concerned the amount of income which has been disallowed by the Minister, and not exempted from tax, totals $19,617. In their appeal to the Exchequer Court the appellants were entirely unsuccessful. On further appeal to the Supreme Court they were successful as to two-fifths of the income for the two years 1938 and 1939.

The first submission is that each year, on the closing of the executor's account, thirty-three per cent. of the forty per cent. of the net revenue, which, by the terms of cl. 35 of the will, is to be invested as part of the capital of "my trust estate," vests in the Royal Trust Company. It is obvious, and not disputed, that that company does not take a beneficial interest under this trust; it is equally obvious that that company is not a charitable institution. The five beneficiaries are owners of the shares of the net revenue which is vested, even though these five charities do not at any time receive the capital of the accumulated income or of any part other than income

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of the trust estate. The direction in cl. 35 of the will to invest the surplus of the annual revenue as capital of the trust estate has the direct and immediate effect of vesting it in the beneficiaries: *Browne* v. *Moody* (1). Although *Dale* v. *Mitcalfe* (2) is clearly concerned with a non-vested interest, it equally clearly points out that accumulations of income made and added to capital were considered to be for the benefit of the ultimate income beneficiaries. Applying that to the present case, the accumulations of income were being made for the beneficiaries of charities which would eventually receive the income from the capitalized accumulations. If it be right, as it is submitted that it is, that the income in dispute is that of the five charitable institutions, then any further examination of the Income War Tax Act would be unnecessary, for it would plainly be exempt from taxation by virtue of s. 4 (*e*) of that Act. It is in some ways a restricted income, because, first, they do not get it into their own hands but receive it only as a benefit through increased capital giving increased income. The Supreme Court accepted the Salvation Army and the Lacombe Home as being charitable institutions and ascertained persons.

It is submitted that the other three charities, which have been established in a legal manner in the Alberta courts as trustees for charitable purposes, are in exactly the same position as the Salvation Army and the Lacombe Home. The judgments of both courts below went astray in saying that the other three were not charitable institutions within the meaning of the Act. The fact that those three charitable institutions have not any staff at the moment does not preclude them from being charity organizations. *Minister of National Revenue* v. *Trusts and Guarantee Co.* (3) does not apply to this case. There is nothing which allows s. 11, sub-s. 4, to make taxable something which is exempt under s. 4 (*e*).

To summarize: first, thirty-three per cent. of forty per cent. of the net annual surplus of income in the Burns estate is vested primarily in the Burns Memorial Trust; secondly, the five charities referred to in the will are charitable institutions within the meaning of s. 4 (*e*) of the Act, and the income in question is accordingly exempt from taxation; thirdly, s. 11 does not purport to tax income which is exempted under s. 4 (*e*); and fourthly, the income in dispute should be declared

(1) [1936] A. C. 635.
(2) [1928] 1 K. B. 383, 389.
(3) [1940] A. C. 138.

untaxable for each of the four years 1938 to 1941, inclusive, as not falling within any of the charging provisions of the Act.

Morison K.C. and *B. MacKenna* for the respondent. The main question raised by the appellants is whether the income for the years in question is income of a charitable institution or institutions and therefore exempted from taxation by virtue of s. 4 (*e*) of the Act. To secure the exemption conferred by that section it must in the first place be demonstrated that the bodies receiving the income are charitable institutions, and it must also be shown that the income in question is income of those institutions. Assuming, without conceding, in the appellants' favour that the Royal Trust Company, as trustee for the Burns Memorial Trust, and the five main charities are all charitable institutions, it is submitted that no part of the trust income in the relevant years is the income of any of those institutions within the meaning of the Act. If that is so, then obviously the claim for exemption fails. From the scheme of the will it is plain that the thirty-three per cent. of income here in question is not the income of the five main charities; all that they are entitled to under the will is the income of a capital sum which is to be paid over to the Royal Trust Company at a future date. The five main charities never in any shape or form receive, or are entitled to, or have, any interest in the income now in question. It is a vested right in the capital only of the estate, and not a vested right in the income. Apart from this income not being income of the five main charities, it is not the income of the Royal Trust Company or of the Burns Memorial Trust, if it can be called a separate entity at all. The right which the Royal Trust Company has is to receive the thirty-three per cent. on the occurrence of a particular event, and until that particular event occurs it has no right except its say in the administration of the trust.

If these submissions be correct the argument for the appellants fails on the initial stage that the income is not the income of the charitable institutions, and the claim for exemption fails on that ground Alternatively, if anybody receives this income as income it is the Royal Trust Company, and it is administering a charitable trust, is not a charitable institution and therefore is not within s. 4 (*e*). *Minister of National Revenue* v. *Trusts and Guarantee Co.* (1) specifically states that charitable trusts are not exempted. In relation to what is a charitable institution see *Cosman's Trustees* v. *Minister of National Revenue* (1). Accordingly, the appellants have not established any claim to exemption of this income for the four years in question under s. 4 (*e*) of the Act.

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(1) [1940] A. C. 138, 149.

Apart from the question whether it was exempted by virtue of s. 4 (*e*), it is submitted that three-fifths of the income, i.e., three-fifths of the thirty-three per cent. of the forty per cent., was accumulating in trust for the benefit of unascertained persons and was taxable under s. 11, sub-s. 2, of the Act, which has been held to be a true charging section: *Holden* v. *Minister of National Revenue* (2). The respondent is within the construction put on the sub-section in *Minister of National Revenue* v. *Trusts and Guarantee Co.* (3). [Reference was also made to *St. Lucia Usines and Estates Co.* v. *St. Lucia* (*Colonial Treasurer*) (4).] With regard to the position in 1940, it is submitted that the whole of the thirty-three per cent. of the income is taxable in that year under s. 11 sub-s. 4 (*a*). If that is wrong, but the argument is right on 1938 and 1939, s. 11, sub-s. 2, will continue to apply. Therefore the argument for 1940 is either that the whole of the income in question is taxable under s. 11, sub-s. 4 (*a*), or, alternatively, that three-fifths of it is taxable under s. 11, sub-s. 2. This income is received by an estate or trust, and it is capitalized in virtue of an express direction of the testator to that effect. Therefore the first line of sub-s. 4 (*a*) is satisfied entirely. Then the sub-section goes on to say that the income shall be taxable in the hands of the executors and trustees, and that is merely explanatory of the people who are to pay the tax. So far as 1941 is concerned, all the judges in the Supreme Court held that the whole of the trust income was subject to tax in that year by virtue of s. 11, sub-s. 4 (*a*) and (*c*), and I understand that that part of the judgment is not challenged by the appellants. The order of the Supreme Court is sound in law.

B. MacKenna followed.

S. G. Dixon K.C., replied. It is admitted with regard to the year 1941 that unless this income is under s. 4 (*e*)—charitable institution income—then the appellants are liable. As to 1940, under s. 11, sub-s. 4 (*a*), there is no way of working out the rate at which the tax shall be paid.

(1) (1941) 2 D. L. R. 218; 3 D. L. R. 224.

(2) [1933] A. C. 526.

(3) [1940] A. C. 138, 149.

(4) [1924] A. C. 508, 512.

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Feb. 28. LORD GREENE delivered the judgment of their Lordships. This is an appeal by the executors of the Honourable Patrick Burns deceased (who died on February 24, 1937), and six added parties who are interested under his will, from a judgment of the Supreme Court of Canada allowing in part an appeal by the appellants from a judgment of the Exchequer Court. That judgment had dismissed an appeal by the executors from a decision of the present respondent, the Minister of National Revenue, who had confirmed assessments to income tax in respect of the four years 1938 to 1941, inclusive, under the provisions of the Income War Tax Act of the Dominion. The appeal relates to the liability to income tax of certain income received by the executors in the years in question and capitalized by them pursuant to directions in the will. The nature of the added parties and their interests in relation to this income require a more detailed explanation.

By the will of the testator his executors (called his " trustees ") were directed in the events which happened to hold the residue of his estate (described as his " trust estate") subject to provision for an annuity to his son's widow and certain other fixed annuities upon trust until the death of the last of those annuitants or the death of the widow of his son (neither of which events has happened) to pay certain percentages totalling 60 per cent. of the net annual income of the trust estate by way of annuities to nephews and nieces of the testator and to invest the surplus as part of the capital of the trust estate at compound interest. On the death of the last fixed annuitant or that of the widow of his son, whichever should last happen, the trustees were to stand possessed of his " trust estate " with all accumulations and additions upon trust to distribute 67 per cent. thereof among nephews and nieces " and upon the further trust to pay and " convey the rest, residue and remainder of ' my trust estate ' " unto the Royal Trust Company for the creation and " establishment of a trust to be known as the ' Burns Memorial " ' Trust ' to be administered by it as trustee at its office " in the City of Calgary, in the Province of Alberta, and the " net annual income therefrom to pay and distribute annually " in equal shares thereof amongst " five named objects. The gifts in favour of these five objects were by order of the Supreme Court of Alberta dated December 11, 1939, declared to be valid charitable gifts. Object No. 1., described in the will as the "Father Lacombe Home at Midnapore," is part of the charitable work carried on by Les Sœurs de Charité de la Providence and is the second added appellant. By the order of December 11, 1939, the proper name of the body mentioned as object No. 2. in the will was declared to be "The Governing "Council of the Salvation Army Canada West," under which name it appears as the third added appellant. The charitable objects mentioned in the will under the numbers 3, 4 and 5, not being existing charities, the same order directed that separate schemes in regard to them, all in substantially the same form, should be approved. The last three added appellants are the trustees of the schemes so approved. The nature of the trusts to be carried into effect under these schemes appears sufficiently from the titles of the schemes as being for the benefit of "poor and indigent and neglected "children," "widows and orphans of members of the Calgary "Police Force," and "widows and orphans of the Calgary "Fire Brigade." The first added appellant, "The Royal "Trust Company," referred to in the will is a commercial company whose objects are not limited to charitable objects.

In each of the years in question the executors paid out of the income of the trust estate the fixed annuities and other sums payable thereout and distributed 60 per cent. of the balance among the named nephews and nieces. The surplus, amounting to 40 per cent., they transferred for accumulation to capital account in their books. Sixty-seven per cent. of this surplus was ultimately divisible under the will between the nephews and nieces, and 33 per cent. was ultimately payable to the Royal Trust Company. It is with income tax claimed by the respondent in respect of this 33 per cent. in the years in question that the present controversy is concerned.

It is to be noted that the ultimate destination of any fund which at the date of distribution will represent accumulations of this 33 per cent. will, under the terms of the will and pursuant to the order of the Alberta court, be in favour of charity. Those accumulations, however, will be and remain capital funds, and will be held as such by the appellants the Royal Trust Company; only the income of the accumulated fund will be payable to the last five added appellants for charitable purposes. Although the ultimate destination of the funds will be to constitute capital funds for charitable purposes, the machinery for bringing them to the hands of those whom the testator nominates as the bodies to administer

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the several charities is somewhat complicated. The persons who will receive the 33 per cent. of surplus income during the period between the death of the testator and the date of distribution are the executors. They are the persons charged with the duty of receiving and accumulating it. When the date of distribution arrives, 33 per cent. of the accumulations will be handed over to the Royal Trust Company as a capital fund. That company will continue to hold and administer this capital fund, but the annual income of the fund is to be paid over to the last five added appellants. The purpose for which the 33 per cent. share of the accumulations is to be handed over to the Royal Trust Company is stated to be " for the creation and establishment of a trust to be known " as The Burns Memorial Trust to be administered by it " [i.e., the Royal Trust Company] as trustee."

The appellants' first and most important claim is that the income in question was not liable to taxation by reason of s. 4 (*e*) of the Act, which exempts from liability: " The " income of any religious, charitable, agricultural and educa- " tional institution, board of trade and chamber of commerce, " no part of the income of which inures to the personal profit " of, or is paid or payable to any proprietor thereof or " shareholder therein." The income, they submitted, was the income either of the five added appellants or of the " Burns " Memorial Trust." All of these, they claim, were " charitable " institutions," and the 33 per cent. of the surplus income was entitled to the exemption.

In order that the income may be exempted under the relevant words of s. 4 (*e*) two conditions must exist: the body claiming exemption must be a " charitable institution " and the income must be its income. If either of these conditions is absent the claim to exemption must fail. The Deputy Judge in the Exchequer Court held that the income in question was not " income " of any of the added appellants, and consequently he did not find it necessary to decide whether any of them was a charitable institution within the meaning of the section. He expressed, however, the following opinions: (1.) that the Royal Trust Company is obviously not a charitable institution; (2.) that the " Burns Memorial Trust " is nothing more than a name attached to a fund and is not a charitable institution. The same opinions were expressed by all the judges of the Supreme Court, and their Lordships take the view that they are manifestly correct. With regard

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to the argument that the last five added appellants are "charitable institutions" entitled to claim exemption, the Deputy Judge said: "But holding as I have done that no "part of the income for any of the relevant years will at any "time reach the beneficiaries [i.e., the five bodies in question] "as income, it is quite unnecessary for me to determine this "point and I make no finding in regard thereto."

In the Supreme Court this claim to exemption was held to fail for the same reason, although in the opinion of the majority the Lacombe Home and the Salvation Army were religious or charitable institutions. This latter expression of opinion was, however, not necessary to the decision. Their Lordships, while not desiring to throw any doubt on its correctness, prefer to base their decision on the view taken both by the Deputy Judge and by all the members of the Supreme Court that the income was not income of any of the five added appellants. The executors are the recipients of the income. It is their duty to accumulate it and ultimately to hand over the accumulation to the Royal Trust Company. That company will receive these accumulations not as income but as a capital fund which will always remain capital in its hands. All that it will disburse, all that the five bodies will receive, will be the income of that capital fund. It is true that the company and the five bodies are entitled to enforce the obligations in respect of the income which the will imposes on the executors, and the five bodies will also be entitled to enforce the obligations in respect of the administration of the accumulated fund and the distribution of its income which are imposed on the company. But this does not make the income received by the executors or the capital fund to be received by the Royal Trust Company in any sense or at any time the income of those bodies. This being in their Lordships' view a conclusive answer to the whole of the claim based on para. (*e*) of s. 4, they prefer to express no opinion on the question whether any of the five bodies are institutions within the meaning of that paragraph.

But this does not dispose of the matters in issue. The Deputy Judge of the Exchequer Court had held that the whole of the income was covered by the charging provisions of the Act, and dismissed the appeal to that court. In the Supreme Court a different view was taken and the appellants obtained a measure of success. The majority (consisting of Rinfret C.J., Kerwin and Hudson JJ.) thought that two-fifths of the income in question (being that proportion from which the Lacombe Home and the Salvation Army are ultimately entitled to the interest thereon) were free from income tax for the years 1938 and 1939 on the ground that in those years there was no relevant charging section in the Act which applied to that proportion. The minority (consisting of Rand and Estey JJ.) took a view more favourable to the appellants. They considered that the entirety of the 33 per cent. of the income, and not merely two-fifths of it, was free from income tax for those two years and also for the year 1940 on the ground that no charging section applied to any of it until the year 1941. Their Lordships are of opinion that the majority of the High Court were right in thinking that the two-fifths of the income indicated by them was free from tax, but they agree with the view of the minority that it was so free also for the year 1940. They are unable, however, to accept the view of the minority that the remaining three-fifths of the income was free from tax for any of the years in question.

The questions here involved turn on the construction of certain provisions of s. 11 of the Act and on the effect of two amendments made in sub-s. 4 of that section, one having effect for the year 1940 and the other for the year 1941. The general scheme of the Act in the case of trust property is to impose the tax on the persons beneficially entitled to the income, and not on the trustees. But in some cases this would have led to administrative difficulties in enforcing the tax against anyone. Examples of cases where the tax is imposed on trustees are to be found provided for in s. 11. The first sub-section of that section refers to the general scheme. It provides as follows: " The income, for any taxation period, " of a beneficiary of any estate or trust of whatsoever nature " shall be deemed to include all income accruing to the credit " of the taxpayer whether received by him or not during such " taxation period."

It is convenient here to interpose a reference to an argument which was at one time advanced on behalf of the appellants, namely, that the income in question could be regarded as income of the five bodies, they being (it was suggested) " beneficiaries " to whose " credit " the income was accruing. Their Lordships are of opinion that this argument cannot prevail. They consider that this income is not " income " accruing to the credit of any of them. All that they are entitled to is to receive at a future date a capital sum built

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up from receipts which, as has been already pointed out, could never be carried to their credit as income. The sub-clause, in their Lordships' opinion, is dealing with income "accruing to the credit" of a "taxpayer" only in the sense that it is income which is his although not yet paid to him.

Sub-section 2 of the section, so far as material, provides as follows: "Income accumulating in trust for the benefit of "unascertained persons, or of persons with contingent interests "shall be taxable in the hands of the trustee or other like "person acting in a fiduciary capacity, as if such income "were the income of a person other than a corporation, "provided that he shall not be entitled to the exemptions "provided by paragraphs (*c*), (*d*), (*e*) and (*i*) of sub-section one "of section five of this Act . . . ."

It was argued on behalf of the respondent that the whole of the income in question was chargeable under this sub-section as being income accumulating in trust for the benefit of "unascertained persons." The majority of the Supreme Court accepted this argument as regards the proportion of the accumulating income which will ultimately be handed over to the three sets of trustees. In the case of those bodies they considered that the accumulations were in trust for the benefit of the several objects of the charities, namely, the poor, indigent and neglected children, the widows and orphans of members of the Police Force, and the widows and orphans of members of the Fire Brigade. These they considered to be "unascertained persons," so that the wording of the sub-section was precisely applicable. Rand and Estey JJ., on the other hand, thought that the income could not be said to be accumulating in trust for the "benefit" of those objects who would never receive it as income since all that they will receive as income will be the income of the accumulated fund, not that fund itself.

The question is not free from difficulty, but their Lordships find themselves in agreement with the view of the majority of the Supreme Court. The expression "for the benefit of" appears to them to be wide enough in its ordinary significance to cover the case where the unascertained persons will receive an interest in the income to be derived from the fund built up from the accumulating income. It is true that if the view of the majority of the Supreme Court is accepted there might in that class of case be a certain measure of overlapping with sub-s. 4, at any rate in its form as finally amended. The view which their Lordships favour does, however, find support in the language used by Lord Romer in delivering the opinion of the Board in *Minister of National Revenue* v. *Trusts and Guarantee Co.* (1). He said of sub-s. 2: "The sub-section "applies in every case where income is being accumulated "in trust for the benefit of unascertained persons whether "those persons will or will not ultimately take a vested interest "in such income, and whether they will or will not ever become "entitled to specific portions of it. In the present case the "accumulated interest in the hands of the respondents as "trustees will in the year 1948 have to be handed over to "the Municipal Council of Colne as trustees in trust to be "applied for the benefit of the aged and deserving poor of "that town. Such aged and deserving poor are without any "question persons, and equally without question they are "unascertained. The case, therefore, seems to fall within "the very words of the sub-section."

No doubt the accumulating fund in that case (and not merely its income) was itself to be applied for the benefit of the aged and deserving poor so that they would be the ultimate recipients of the fund built up of the accumulating income (although they would not have received it as income). The language used does not, however, confine the principle expounded to cases of that character, but is wide enough, and, in their Lordships' view, intentionally wide enough, to cover such a case as the present. Their Lordships are therefore of opinion that, with regard to the three-fifths of the income in which the three sets of trustees are interested, the majority of the Supreme Court came to the right conclusion. That proportion is covered by sub-s. 2, which is admittedly a charging provision, and as it is not exempted under s. 4 (*e*) the appeal to that extent fails.

As regards the Lacombe Home and the Salvation Army, all members of the Supreme Court took the view that the proportions of income in which those bodies were interested were exempt from taxation under sub-s. 2 for the years 1938 and 1939. The majority based their conclusion on the view that these bodies were ascertained persons and as such were the persons for whose benefit the income was accumulating. There is no cross-appeal from this decision. The minority, on the other hand, considered that these proportions escaped taxation under the general principle enunciated by them that the income could not be said to be accumulating for their "benefit" and they will never receive it as income. Their Lordships have already given reasons for not accepting this reasoning of the minority. Accepting, therefore, the view of the majority of the Supreme Court as they do, there is nothing which imposes a charge to tax on these two-fifths.

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(1) [1940] A. C. 138, 148.

But sub-s. 4 of s. 11 remains to be considered. For the years 1938 and 1939 this sub-section was in the following form: "Dividends received by an estate or trust and "capitalized shall be taxable income of the estate or trust." It was not contended that the sub-section in this form operated to charge these shares of income in those two years. In 1940 Parliament substituted a new sub-s. 4 (*a*) for the original sub-s. 4 in these terms: "(4.) (*a*) Income received by an "estate or trust and capitalised shall be taxable in the hands "of the executors and trustees, or other like persons acting "in a fiduciary capacity." The majority of the judges of the Supreme Court took the view that, unlike the original sub-s. 4, this substituted provision operates as a true charging section notwithstanding that it does not expressly say what the rate of taxation is to be. That omission, they thought, could be supplied on the ground that this Board, in *Holden* v. *Minister of National Revenue* (1), construed s. 11, sub-s. 2, in its then form as a valid charging section, the rate of taxation being sufficiently indicated by the words then present in that sub-section which provided that the income there dealt with should be taxed "as if such income were the income of an unmarried "person."

Their Lordships cannot agree with this reasoning. They share the difficulties expressed by Rand J. and Estey J. in their dissenting judgments. As Estey J. said, "without a "rate or determinable amount there can be no impost," and neither of those judges was prepared to imply a reference either to the rate expressly specified for cases falling under s. 11, sub-s. 2, or any other rate. With this view of the matter their Lordships are in agreement. The two-fifths of the 33 per cent. in which the two named bodies are interested is accordingly not subject to tax for the year 1940.

For the year 1941, however, the omission was made good. Parliament for that year and following years added a new paragraph, (*c*), to sub-s. 4, reading as follows: "Income "taxable under the provisions of this sub-section shall be

(1) [1933] A. C. 526.

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" taxed as if such income were the income of a person other " than a corporation, provided that no deduction shall be " allowed in respect of the exemptions provided by paragraphs (*c*), (*d*), (*e*), (*ee*) and (*i*) of sub-s. 1 of s. 5 of this Act." Their Lordships agree with the unanimous opinion of the Supreme Court that this addition states with sufficient precision what the basis of the impost is to be and turns the sub-section into a valid charging provision covering the whole of the income in question.

In the result their Lordships will humbly advise His Majesty that in the order and declaration made by the Supreme Court the year 1940 should be added to the years 1938 and 1939 for which the two-fifths of the income in question (being the proportion from which the Lacombe Home and the Salvation Army are ultimately entitled to the interest thereon) are declared to be free of income tax, and that this appeal should be allowed to that extent but no further. The order of the Supreme Court as to costs will stand. The appellants, having failed on their main contention, must pay three-quarters of the respondent's costs of the appeal.

Solicitors: *Lawrence Jones & Co.; Charles Russell & Co.*

[PRIVY COUNCIL]

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AKISATAN APENA OF IPORO AND OTHERS . . . . . . APPELLANTS;

AND

AKINWANDE THOMAS AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Nigeria—Supreme Court—Native Courts—Jurisdiction—Supreme Court Ordinance, No. 23 of 1943, s. 12.

The Supreme Court Ordinance, No. 23 of 1943, Laws of Nigeria, by which the present Supreme Court of Nigeria was established,

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**Present:* LORD GREENE, LORD SIMONDS and LORD MORTON OF HENRYTON.

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contemplates that there may be concurrent jurisdiction in the Supreme Court and a Native Court—which is inconsistent with the vesting of exclusive jurisdiction in the Native Courts where, ex facie, the Supreme Court would have jurisdiction. The opening words of s. 12 of the Supreme Court Ordinance, which enact that," subject to " such jurisdiction as may for the time being be vested by Ordinance in Native Courts, the Supreme Court shall have the thereinafter defined jurisdiction, are equivalent to " without prejudice to," and are not to be construed as ousting the jurisdiction of the Supreme Court and vesting exclusive jurisdiction in a Native Court in any matter in respect of which jurisdiction had been vested by Ordinance in that Native Court.

The proviso to s. 12 is conclusive on the question, for if it were the correct view of the substantive part of the section that it enacted that in all cases in which a Native Court has jurisdiction that of the Supreme Court is ousted, there would be no sense in providing by a proviso that in certain of such cases the Supreme Court should not exercise jurisdiction. Further, there is nothing in the previous history of the legislation by which courts were established in the Colony and Protectorate of Nigeria, or in the context of the Ordinance of 1943, which would suggest that in 1943 so drastic a measure would be taken as substantially to limit the jurisdiction of the Supreme Court in favour of the Native Court.

Accordingly, in a suit which did not raise any issue in respect of which it was specifically enacted by the proviso to s. 12 that the Supreme Court should not exercise original jurisdiction, and there was a Native Court—a Grade A Court—of competent jurisdiction, the Supreme Court had jurisdiction to entertain the suit.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 96 of 1947) from a judgment of the West African Court of Appeal (November 12, 1946) varying a judgment of the Supreme Court of Nigeria (November 15, 1945).

The suit out of which this appeal arose was instituted by the respondents against the appellants and a pro forma respondent for a declaration that the installation of the second and third appellants in the offices of Oluwo of Iporo and Balogun of Iporo respectively by the first appellant and the pro forma respondent was contrary to native law and custom, and for an injunction restraining the second and third appellants from performing the duties of the offices.

The main question in the appeal was whether the Supreme Court of Nigeria had jurisdiction to try the case, as under s. 12 of the Supreme Court Ordinance, No. 23 of 1943, Laws of Nigeria, there was in existence a Grade A Native Court competent to try such cases.

On that question the trial court (Pollard J.) held that no Grade A Native Court was in existence. The finding of the West African Court of Appeal (Verity C.J. (Nigeria), Lucie-Smith C.J. (Sierra Leone), and M'Carthy J. (Gold Coast)) was in the affirmative—that the Supreme Court had jurisdiction—though it held that the finding of the trial court with regard to the non-existence of a Grade A Native Court was erroneous.

On the main issue, whether the installation of the second and third appellants in the above-named offices was contrary to native law and custom, the findings both of the trial court and the appeal court were in the affirmative.

By s. 12 of the Supreme Court Ordinance, No. 23 of 1943, Laws of Nigeria : " Subject to such jurisdiction as may for " the time being be vested by Ordinance in Native Courts, " the jurisdiction by this Ordinance vested in the Supreme " Court shall include all His Majesty's civil jurisdiction which " at the commencement of this Ordinance was, or at any time " afterwards may be exercisable in Nigeria, for the judicial " hearing and determination of matters in difference, or for the " administration or control of property and persons, and also " all His Majesty's criminal jurisdiction which at the commencement of this Ordinance was, or at any time afterwards " may be there exercisable for the repression or punishment " of crimes or offences or for the maintenance of order ; and " all such jurisdiction shall be exercised under and according " to the provisions of this Ordinance and not otherwise.

" Provided that, except in so far as the Governor may by " Order in Council otherwise direct and except in suits transferred to the Supreme Court under the provisions of s. 25 " of the Native Courts Ordinance, 1933, the Supreme Court " shall not exercise original jurisdiction in any suit which " raises any issue as to the title to land or as to the title to any " interest in land which is subject to the jurisdiction of a Native " Court nor in any matter which is subject to the jurisdiction " of a Native Court relating to marriage, family status, " guardianship of children, inheritance or disposition of " property on death."

1950. Jan. 30, 31 ; Feb. 1. *Rewcastle K.C.* and *L. E. H. Fellows* for the appellants. The main question is whether the Supreme Court had jurisdiction to entertain the action, and that depends purely on the construction of s. 12 of the Supreme

Court Ordinance: there is no authority on the point. It is submitted that the trial judge would have decided that he had no jurisdiction if he had been aware that a Grade A Native Court did exist. Since there was in fact such a court, the jurisdiction of the Supreme Court is ousted except in certain special circumstances. No court but a Grade A Court had any jurisdiction to entertain this suit. The opening words of s. 12, "subject to such jurisdiction as may for the time being "be vested by Ordinance in Native Courts, the jurisdiction "by this Ordinance vested in the Supreme Court shall include " . . . .," must mean that, so long as there is no jurisdiction vested in the Native Court, the jurisdiction of the Supreme Court "shall include" etc., which means that if there is jurisdiction in the Native Court the jurisdiction by the Ordinance vested in the Supreme Court does not include whatever is included in the jurisdiction of the Native Court.

If that be right, it is long before the writ is issued that that court has jurisdiction, and the words "subject to "such jurisdiction as may for the time being be vested by "Ordinance in Native Courts" are not apt to cover a matter of concurrent jurisdiction. "Subject to" must mean "with "the exception of." That is not inconsistent with the proviso, which says that in no circumstances shall the Supreme Court exercise jurisdiction except in certain circumstances. "Subject "to" in this context means that if this jurisdiction is found in the Native Court, then the Supreme Court has not original jurisdiction to deal with this subject-matter as between natives. If the words "subject to" have not that meaning it is difficult to see how they can possibly be of any value. If there is a concurrent jurisdiction in the two courts right up to the issue of the writ, what is the object of putting in the words "subject to" etc.? They are in that case quite otiose and have no meaning. [The history of the legislation setting up native courts—which were originally established by proclamations under the Foreign Jurisdiction Act, 1843—from the Native Courts Ordinance, No. 5 of 1918, to the Native Courts Ordinance, No. 44 of 1933, as amended to 1936, was referred to.]

So far as the Native Court has jurisdiction as between natives and persons covered by the Native Courts Ordinances it is to that court that their cause is intended to go: it was meant to have exclusive jurisdiction. Full jurisdiction means exclusive jurisdiction, and it was to preserve all the jurisdiction that there is in these matters in Native Courts that the opening words of s. 12 were put in. That is the scheme which emerges from the legislation looked at as a whole. Alternatively, it is submitted that if, on the other hand, there is a concurrent jurisdiction, it is a concurrent jurisdiction of such a kind that if the native so chooses he can insist on going to the Native Court; in other words, the opening words of s. 12 preserve the right of persons entitled under the Native Courts Ordinance to resort to a Native Court so to resort, but without conferring an exclusive jurisdiction on the Native Court or ousting the jurisdiction of the Supreme Court.

[The Board intimated that this alternative point was not open to the appellants.]

Fellows followed.

Horace Douglas K.C. and *Collier* for the respondents. The submission for the appellants is one which, if accepted, would involve ousting the jurisdiction of the Supreme Court—a very serious matter which might involve remarkable consequences. The construction put on s. 12 for the appellants is that, as soon as a warrant has been issued to a Native Court conferring power on the Native Court A, the jurisdiction of the Supreme Court under s. 12 no longer exists. No meaning can be given to the section if that is so. The argument for the respondents is very brief, and is embraced entirely by the following carefully-phrased passage from the judgment of the Appeal Court's judgment: " If the words ' subject to such juris-" ' diction as may for the time being be vested by Ordinance " ' in Native Courts ' are to bear the meaning placed upon " them by counsel for the appellants, then there would appear " to be no reason for and no meaning in the proviso, for if the " Supreme Court has no jurisdiction in any matter within the " jurisdiction of a Native Court then it would follow that it " can have no jurisdiction in the limited classes of case referred " to in the proviso. The plain meaning of the proviso is that " the Supreme Court shall not exercise in limited classes of " case the jurisdiction which it otherwise has power to exercise. " If that be so, then the meaning of the opening words of the " section pressed upon us by counsel for the appellants cannot " be the right meaning. So to hold would be to decide that " the legislature by the proviso intended to limit a jurisdiction " which the Supreme Court could not in any event exercise.

"Clearly there must be some other way of construing these "words in order to give effect to the intention of the legislature "without straining their meaning. It appears to us that no "other reasonable interpretation can be given to them than "that the Supreme Court shall exercise its jurisdiction subject "to that of the Native Courts so that where a Native Court "has exercised or is exercising the jurisdiction vested in it "by Ordinance the jurisdiction of the Supreme Court shall "not supersede it and shall not be exercised in the same matter. "This is a limitation obviously desirable wheresoever there "may exist courts of equal and concurrent jurisdiction within "the same area, and such an interpretation gives coherence "to the whole section and meaning to each part thereof."

It is true that "subject to" might create an ambiguity, but it was intended to make it clear that the Supreme Court was not to intervene in a case which was already before the Native Court. On the true construction and interpretation of the Supreme Court Ordinance, No. 23 of 1943, and of the Native Courts Ordinance, No. 44 of 1933, the Supreme Court has jurisdiction in the matter of the suit.

Collier, following, referred to *Ekpang Umo Essen* v. *Ntuen Ibok Ediok* (1), *Galsworthy* v. *Durrant* (2) and Maxwell on the Interpretation of Statutes, 9th ed., p. 134.

1950. Feb. 28. The judgment of their Lordships was delivered by Lord Simonds. This appeal, which is brought from a judgment of the West African Court of Appeal varying a judgment of the Supreme Court of Nigeria, raises an important question in regard to the jurisdiction of the latter court. The suit in which the appeal arises was instituted by the respondents (other than a formal respondent), who claimed to be representatives of a certain section of the Iporo community in Abeokuta, against the appellants and the formal respondent, claiming a declaration that the installation by the first appellant of the second and third appellants in the offices of Oluwo of Iporo and Balogun of Iporo, respectively, was contrary to native law and custom, and for an appropriate injunction. It was conceded by counsel for the appellants that, in view of concurrent findings by the Supreme Court and the Court of Appeal, the only contention now open to him was that the orders of which he complained were made without jurisdiction, and that, if that question were decided against the appellants, the appeal must be dismissed. Their Lordships therefore think it unnecessary to state the facts, which are fully set out in the judgments under review, and deal only with the question of jurisdiction.

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(1) (1936) 13 Nig. L. R. 99.

(2) (1860) 29 Beav. 277.

The present Supreme Court of Nigeria was established by Ordinance No. 23 of 1943, Laws of Nigeria, and its jurisdiction was conferred and defined by s. 12 in the following terms: [His Lordship stated the terms of the section and continued :] It was not contended before their Lordships that the present suit raised any issue in respect of which it was specifically enacted by the proviso to the section that the Supreme Court should not exercise original jurisdiction. But it was contended that the effect of the opening words of the section "subject to such jurisdiction as may for the time being be "vested by Ordinance in Native Courts" was to oust the jurisdiction of the Supreme Court and to vest exclusive jurisdiction in a Native Court in any matter in respect of which jurisdiction had been vested by Ordinance in that Native Court. It does not appear that the acting judge who heard the case considered this broad proposition. He had the mistaken impression that there was no Native Court of competent jurisdiction : it was therefore unnecessary for him to do so. But the Court of Appeal, being correctly informed that there was such a court (of which their Lordships also are satisfied by the production of a certified copy of the warrant establishing it), fully considered the contention, and, in a judgment with which their Lordships are in complete agreement, rejected it.

The importance of the question led their Lordships to a review of the whole of the antecedent legislation by which courts were established in the Colony and Protectorate of Nigeria. They thought it desirable to survey this background in order to appreciate the relative positions of the Supreme Court and the Native Courts. Having done so, they can entertain no doubt that the reasons given by the judges of the West African Court of Appeal for rejecting the appellants' contention are unimpeachable. There is nothing in the previous history of such legislation or in the context of the relevant Ordinance which would suggest that in 1943 so drastic a measure would be taken as substantially to limit the jurisdiction of the Supreme Court in favour of the Native Court. The question, then, is what is the plain meaning of s. 12 of the Ordinance ?

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On this question it appears to their Lordships that the language of the proviso is decisive. If it were the correct view of the substantive part of the section that it enacted that, in all cases in which a Native Court had jurisdiction, that of the Supreme Court was ousted, there would be no sense in providing by a proviso that in certain of such cases the Supreme Court should not exercise jurisdiction. If it were otherwise, then (as the Court of Appeal said in words which cannot be improved) " the legislature by the proviso " intended to limit a jurisdiction which the Supreme Court " could not in any event exercise." But their Lordships would not have it thought that the effect of the proviso is to wrest the language of the section from its natural meaning. The opening words, on which the appellants rely, do not necessarily bear the meaning for which they contend, which is in effect to read them as if they ran " Except in those matters " in respect of which jurisdiction may from time to time be " vested in Native Courts." On the contrary, they would, even without the proviso, be fairly susceptible of the meaning which is given to them by the Court of Appeal and which might perhaps be very briefly stated by saying that the words " subject to " are equivalent to " without prejudice to."

Nor are there lacking other considerations which point to this as the correct interpretation of the section. It is of major importance that under s. 42 of the Ordinance there is a power to transfer a suit from the Supreme Court to a Native Court at any stage of the proceedings. This makes it clear that the Ordinance contemplates that there may be concurrent jurisdiction in the two courts, for the generality of the language of s. 42 makes it impossible to confine its operation to the cases which fall within the exception to the proviso to s. 12.

But if it is clear that the Ordinance contemplates concurrent jurisdiction, this is inconsistent with the vesting of exclusive jurisdiction in the Native Courts, where ex facie the Supreme Court would have jurisdiction. On the other hand, it appears to their Lordships that, since by the terms of the Ordinance the jurisdiction vested in the Supreme Court was to include *all* His Majesty's jurisdiction, etc., the careful draftsman might well think it desirable to make it clear that this enactment was not to prejudice the Native Courts in the exercise of such jurisdiction as might from time to time be vested in them. Accordingly the section opens with words which are apt to provide that safeguard. Further, it may be observed

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that neither in s. 12 of the relevant Ordinance nor in any other Ordinance to which their Lordships' attention has been called, whether relating to the establishment of Native Courts or to the constitution of the High Court of the Protectorate or of the Supreme Court, is the appropriate word " exclusive " used in relation to the jurisdiction vested in Native Courts. Both in the Ordinance of 1943 and in earlier Ordinances where it is intended to vest exclusive original jurisdiction in such courts this result is achieved by a limitation of, or exception from, the jurisdiction of the High Court or Supreme Court.

For these reasons their Lordships are of opinion that the decision of the West African Court of Appeal was correct, and will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors: *A. L. Bryden & Co.; Rexworthy, Bonser and Wadkin.*

Referred to. NELUNGALOO PTY. LD. *v.* COMMONWEALTH OF AUSTRALIA [1951] A. C. 34

[PRIVY COUNCIL.]

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COMMONWEALTH OF AUSTRALIA AND OTHERS . . . . APPELLANTS;

AND

BANK OF NEW SOUTH WALES AND OTHERS . . . . RESPONDENTS.

[AND CONNECTED APPEALS.]

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Banking—Legislation prohibiting business of banking by private banks—Constitutionally invalid—Banking Act (Commonwealth) (No. 57 of 1947), s. 46—Commonwealth of Australia Constitution, 1900 (63 & 64 *Vict. c.* 12), *s.* 92.

Practice—Appeal to Privy Council—Determination of inter se questions —Certificate of High Court of Australia—The Constitution, 1900, *s.* 74.

**Present:* LORD PORTER, LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON and LORD MACDERMOTT.

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In every case in which the relief sought on an appeal from the High Court of Australia to His Majesty in Council cannot be granted without the determination of an inter se question, (*a*) no appeal will lie without a certificate of the High Court of Australia given under s. 74 of the Constitution, and (*b*) when that certificate has been given no further leave from His Majesty in Council will be necessary, even though other questions, which are not inter se questions, will have to be determined. Where, therefore, the validity of the Banking Act, 1947, of the Commonwealth in general, and s. 46 thereof in particular, was challenged in the High Court of Australia on grounds which admittedly raised inter se questions, and the determination of each of those inter se questions in favour of the appellants was a necessary condition of a successful defence of the impugned Act in the High Court, and remained a necessary condition of obtaining the relief sought on the appeal to His Majesty in Council, no appeal lay to the Board without a certificate from the High Court of Australia under s. 74 of the Constitution.

Views of the majority of the court in *Baxter* v. *Commissioners of Taxation* (*N. S. W.*), (1907) 4 C. L. R. 1087, on the meaning of the word "decision" in s. 74 disapproved, and that of Higgins J. preferred.

The business of banking, which consists of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred transactions, is included among those activities described as "trade, commerce, and intercourse" in s. 92 of the Constitution, which provides that "trade, commerce, "and intercourse among the States . . . . shall be absolutely "free," and in so far as it is carried on by means of inter-State transactions it is within the ambit of, and its freedom is protected by, that section. Accordingly, s. 46 of the Banking Act, 1947, which, while leaving untouched the Commonwealth and State banks, prohibited the carrying on in Australia of the business of banking by private banks, was invalid as contravening s. 92 of the Constitution.

It would be a strange anomaly if a grower of fruit could successfully challenge an unqualified power to interfere with his liberty to dispose of his produce at his will by an inter-State or intra-State transaction, but a banker could be prohibited altogether from carrying on his business both inter-State and intra-State and against that prohibition would invoke s. 92 in vain. There was no justification for such an anomaly. On the contrary, the considerations which led the Board in *James* v. *Cowan* [1932] A. C. 542, to the conclusion that s. 20 of the South Australian Dried Fruits Act, 1924, offended against s. 92 of the Constitution led them to a similar conclusion in regard to s. 46 of the Banking Act, 1947. *James* v. *Cowan* (supra) and *James* v. *The Commonwealth* [1936] A. C. 578, were strongly against a decision in favour of the validity of s. 46. The test was whether the impugned Act, not remotely or incidentally, but directly, restricted the inter-State business of banking. It clearly did so, since it authorized in terms the total prohibition of private banking, and that being so, in the only sense in which those words could be appropriately used in this case, it was an Act which was aimed or directed at, and the purpose, object and intention of which was to restrict, inter-State trade and commerce. Such phrases as "freedom "as at the frontier or . . . . in respect of goods passing into "or out of the State" and "freedom at what is the crucial point "in inter-State trade, that is at the State barrier," which were to be found in the judgment in *James* v. *The Commonwealth* (supra) must be read secundum subjectam materiam. They were appropriate to, and must be read in, their context. They could not be interpreted as a decision either that it was only the passage of goods which was protected by s. 92, or that it was only at the frontier that the stipulated freedom might be impaired. It was not to be doubted that a restriction applied, not at the border, but at a prior or subsequent stage of inter-State trade, commerce or intercourse, might offend against s. 92. Nor was it in respect of the passage of goods only that such trade, commerce and intercourse was protected.

The conception of freedom of trade, commerce and intercourse in a community regulated by law presupposed some degree of restriction upon the individual, and two general propositions might be accepted: (1.) that regulation of trade, commerce and intercourse among the States was compatible with its absolute freedom, and (2.) that s. 92 of the Constitution was violated only when a legislative or executive act operated to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which might fairly be regarded as remote. That issue could only be decided by the court.

Dictum of Latham C.J. in *Australian National Airways Pty. Ld.* v. *The Commonwealth* (1945) 71 C. L. R. 29, at p. 61, approved and applied.

The Board did not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency, or in some other body, be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it might be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that inter-State trade, commerce and intercourse thus prohibited and thus monopolized remained absolutely free. Further, regulation of trade might clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them, or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens, and there again a question of fact and degree was involved.

State of Tasmania v. *State of Victoria* (1935) 52 C. L. R. 157, referred to.

Held, also (although in the circumstances the point was academic), that in view of the wide terms of s. 6 of the Banking Act supplementing those of s. 15A of the Acts Interpretation Act, 1901–41, s. 46 of the Banking Act was severable from the provisions of the Act held by the High Court to be invalid, and its validity was to be tested as if it were a separate enactment. Further, on its true construction, s. 46 itself contained one indivisible scheme, no part of which could be severed from the rest.

Majority judgment of the High Court of Australia, (1948) 76 C. L. R. 1, affirmed.

CONSOLIDATED APPEALS (No. 55 of 1948), by special leave, from five orders of the High Court of Australia, in exercise of its original jurisdiction (August 11, 1948) in so far as such orders declared that s. 46 of the Banking Act, 1947, of the Commonwealth was invalid, and granted injunctions consequent on such declaration.

By the order granting special leave to appeal the right was reserved to the respondents to raise as a preliminary point on the hearing of the appeals the plea that the appeals did not lie without a certificate of the High Court of Australia under s. 74 of the Constitution; and it was directed that if that preliminary point was decided against the respondents they were to be at liberty to raise all such constitutional points as they thought fit. Section 74 of the Constitution provides that:

> "No appeal shall be permitted to the Queen in Council "from a decision of the High Court upon any question, "howsoever arising, as to the limits inter se of the con-"stitutional powers of the Commonwealth and those of "any State or States, or as to the limits inter se of the "constitutional powers of any two or more States, unless "the High Court shall certify that the question is one "which ought to be determined by Her Majesty in Council.
>
> "The High Court may so certify if satisfied that for any "special reason the certificate should be granted, and "thereupon an appeal shall lie to Her Majesty in Council "on the question without further leave.
>
> "Except as provided in this section, this constitution "shall not impair any right which the Queen may be pleased "to exercise by virtue of Her Royal prerogative to grant "special leave of appeal from the High Court to Her Majesty "in Council. The Parliament may make laws limiting the "matters in which such leave may be asked, but proposed

"laws containing any such limitation shall be reserved by "the Governor-General for Her Majesty's pleasure."

The appellants in each of the five consolidated appeals were the Commonwealth of Australia and the Treasurer of the Commonwealth, and the Commonwealth Bank of Australia and the Governor of the Commonwealth Bank.

The respondents to the first appeal were the Bank of New South Wales, the Commercial Banking Company of Sydney, Ld., the National Bank of Australasia, Ld., the Queensland National Bank, Ld., the Commercial Bank of Australia, Ld., the Bank of Adelaide, the Ballarat Banking Co., Ld., the Brisbane Permanent Building and Banking Co., Ld., and representative shareholders in those banks, and the liquidator of the Queensland National Bank.

The respondents to the second appeal were the Bank of Australasia, Ld., the Union Bank of Australia, Ld., and the English, Scottish & Australian Bank, Ld.

The respondents to the third appeal were the State of Victoria and the Attorney-General for that State; to the fourth appeal the State of South Australia and the Attorney-General for the State; and to the fifth appeal the State of Western Australia and the Attorney-General for the State.

By s. 46 of the Banking Act, 1947 :—

"(1) Notwithstanding anything contained in any other "law, or in any charter or other instrument, a private bank "shall not, after the commencement of this Act, carry on "banking business in Australia except as required by this "section.

"(2) Each private bank shall, subject to this section, "carry on banking business in Australia and shall not, "except on grounds which are appropriate in the normal "and proper conduct of banking business, cease to provide "any facility or service provided by it in the course of its "banking business on the fifteenth day of August, One "thousand nine hundred and forty-seven.

"(3) The last preceding sub-section shall not apply to "a private bank if its business in Australia has been taken "over by another private bank or after that business "has been taken over by the Commonwealth Bank.

"(4) The Treasurer may, by notice published in the "Gazette and given in writing to a private bank, require "that private bank to cease, upon a date specified in the "notice, carrying on banking business in Australia.

" (5) The date specified in a notice under the last preceding " sub-section shall be not more than two months after the " date upon which the notice is published in the Gazette.

" (6) The Treasurer may, from time to time, by notice " published in the Gazette and given in writing to the " private bank concerned, amend a notice under sub-" section (4) of this section (including such a notice as " previously amended under this sub-section) by substituting " a later date for the date specified in that notice (or in that " notice as so amended).

" (7) That later date may be a date either before or after " the expiration of the period of two months referred to in " sub-section (5) of this section.

" (8) Upon and after the date specified in a notice under " sub-section (4) of this section (or, if that notice has been " amended under sub-section (6) of this section, upon and " after the date specified in that notice as so amended), the " private Bank to which that notice was given shall not " carry on banking business in Australia.

" Penalty: Ten thousand pounds for each day on which " the contravention occurs."

The High Court of Australia (Rich, Starke, Dixon and Williams JJ., Latham C.J. and McTiernan J. dissenting) held that s. 46 of the Banking Act, 1947, was invalid as offending against s. 92 of the Constitution, which provides that: " On " the imposition of uniform duties of customs, trade, commerce, " and intercourse among the States, whether by means of " internal carriage or ocean navigation, shall be absolutely " free."

1949. The hearing of the appeal lasted for 36 days between March 14 and June 1 inclusive—a record for length of time.

At the opening of the proceedings, on the application of *Pritt K.C.* and *Gahan* for the States of New South Wales and Queensland, those States were, by way of petition, given leave to intervene in the appeal in support of the appellants.

The Attorney-General for Australia (*Dr. H. V. Evatt K.C.*), the Solicitor-General for Australia (*K. H. Bailey K.C.*), *Pritt K.C.*, *P. D. Phillips K.C.* (Australian Bar), *Gahan*, *H. L. Parker*, and *C. I. Menhennitt* (Australian Bar) for the appellants. The main question is whether s. 46 of the Banking Act is invalidated by s. 92 of the Constitution. Section 46, by giving the Government authority to reject, also gives it an authority to select those, and those only, who may be permitted to conduct banking business in Australia. It is not a general prohibition of banking ; the prohibition is in substance a power to terminate the authority of the corporations to carry on banking business in Australia. The purpose of s. 46 is to substitute, either gradually or in accordance with the views of the Treasurer, publicly-owned banking for privately owned banking. Section 7 of the Act of 1947 provides that "nothing in this Act shall apply to State banking," and the constitutional power in respect of banking in s. 51 of the Constitution provides that "Parliament shall, subject to this "Constitution, have power to make laws for the peace, order "and good government of the Commonwealth with respect "to . . . . . (xiii) Banking, other than State banking . . . ." The two leading cases from the appellants' point of view on s. 92 are *James* v. *Cowan* (1) and *James* v. *The Commonwealth* (2). Section 92 is quite clearly aiming at the elimination of the border restrictions referred to in *James* v. *The Commonwealth* (2), and has very little connexion, if any, with the provisions contained in s. 51 of the Constitution enabling the Commonwealth Parliament to make laws on the subject of the business of banking, and to make laws determining who shall be permitted to conduct that business. In s. 92, at first glance, there is nothing in the way of an individual civil right granted. It is dealing with the subject of trade and commerce and intercourse among the States. Individuals must conduct it, goods must be used in connexion with it, but there is not to be found in the terms of s. 92, and the decisions of the Privy Council negative it, anything in the light of a personal guarantee to individuals. Section 92 has nothing to say on the question whether banking business should be in the hands of privately owned or publicly owned corporations, and a law which by its operation is confining to publicly owned corporations, or to governments, the right to conduct banking business in Australia is not in any way an interference with the freedom which is guaranteed and protected by s. 92. In reaching the contrary conclusion the four judges of the High Court who did so failed to apply, or wrongly applied, the principles laid down by the Board in *James* v. *Cowan* (1) and *James* v. *The Commonwealth* (2). Five out of the six judges in the High Court agreed that, at any rate, sub-s. 4 of s. 46, which is the crucial sub-section because it gives the treasurer

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(1) [1932] A. C. 542. (2) [1936] A. C. 578.

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power by notice to require a private bank to cease to carry on banking business, is a severable and independent provision.

Four constitutional grounds of attack were made by the respondents on s. 46. Firstly, it was said that s. 46 is invalid because it is not a law with respect to banking under s. 51 of the Constitution. Secondly, it was said to contravene s. 92 of the Constitution. Thirdly, that s. 46 was inconsistent with the maintenance of the constitutional integrity of the States. The respondents contended in the High Court that the section infringed on an immunity not discoverable in the words of the Constitution, but they alleged, implied in the Constitution because it is a federation. The States, in other words, claimed that they have a right that the Commonwealth banking power shall be so exercised that the banks shall be kept in existence because the States might wish to deal with them. That argument found no support from any of the judges of the High Court. The fourth ground on which s. 46 was attacked was that it was invalid by reason of the Financial Agreement of 1927 between the Commonwealth and the States made in pursuance of s. 105A of the Constitution. The argument was to this effect: overdraft, it was said, means borrowing from a bank, therefore the national agreement having constitutional force by reason of s. 105A meant that the State could always borrow by overdraft, and therefore it followed by implication again that the private banks had to be kept in existence by the Commonwealth or State law, and could not have their powers terminated by the act of the Commonwealth, the other party to the agreement. That argument was rejected by four judges to two in the High Court.

Dealing first with the positive power of the Commonwealth Parliament to enact s. 46 by reason of para. (xiii) of s. 51 of the Constitution, an analysis of the judgments of the High Court shows that the respondents' contention on that point was rejected by four of the judges and accepted by only two. This is one of the most crucial points of the case. There is a broad distinction between the federal constitution of Australia and that of Canada: *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ld* (1); *James* v. *The Commonwealth* (2). Section 51 is a positive grant of power. What has been called the "pith and substance" test under the Canadian Constitution has been applied by the Privy

(1) [1914] A. C. 237, 252.

(2) [1936] A. C. 578, 610–11.

Council to the Constitution of India: *Prafulla Kumar Mukherjee* v. *Bank of Commerce, Ld., Khulna* (1). The pith and substance test in relation to the Australian Constitution simply means that one must look at the substance of the law to see that one really is in the field of the subject-matter. That is not disputed. On the face of the Australian Constitution there is only one list of powers; powers to make laws "with respect to." That means "in relation to" or "relevant "to," and s. 46 is plainly a law with respect to banking; it deals with nothing else. In dealing with the legislative power of a nation with complete self-government the quality of the sovereignty must be regarded as being in all respects the same as that exercised by the Parliament at Westminster. "The plenary power of legislation is not merely a power to "regulate: it ranges from creation to destruction; it may "establish as well as prohibit": Harrison Moore, The Commonwealth of Australia, 2nd ed., p. 280, et seq. That is the true view to be taken of the Australian Constitution. Looked at in its setting, s. 46 is not a law prohibiting banking; the subject-matter could not in any way be regarded as being prohibited or suppressed. The power over banking given by s. 51 is not limited to banking in relation to any particular type of transactions, but is over the whole subject-matter of banking with the exception of banking conducted by the States. A prohibition, as long as it was a prohibition in relation to the specified subject-matter, would be a law with respect to it within the meaning of s. 51 (xiii) of the Constitution.

The next contention of the respondents was that s. 46 might, or would, prejudicially affect the exercise of the States' constitutional functions or powers by depriving them as customers of the opportunity of banking with one or more of the existing private banks. It was argued that assuming that s. 46 is a law with respect to banking and not otherwise invalidated, it nevertheless infringes an implied limitation to be found from the federal character of the Constitution. The respondents said that if the State has to bank through the Commonwealth Bank of Australia or its own bank the result produced is exactly the same as if the discrimination which failed in *Melbourne Corporation* v. *The Commonwealth* (2) was effective. Our submission is that the general law of the federation is undeviating subjection to the appropriate law both of the Commonwealth and the States. Section 46 is an example of such a law.

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(1) (1947) L. R. 74 I. A. 23, 43.

(2) (1947) 74 C. L. R. 31.

Next, the respondents contended that the provisions of s. 46 are inconsistent with the terms to be implied in the Financial Agreement of 1927, which was validated by s. 105A, sub-s. 5 of the Constitution. The provision of the Financial Agreement with which s. 46 is said to be inconsistent is cl. 5, sub-cl. 9: "Notwithstanding anything contained in this "agreement any State may use for temporary purposes any "public moneys of the State which are available under the "laws of the State, or may, subject to maximum limits, if any, "decided upon by the Loan Council from time to time for "interest, brokerage, discount and other charges, borrow money "for temporary purposes by way of overdraft . . . ." The use of the word "overdraft" assumes that there will be banks in existence, and it is said that the implication of the agreement is that the Commonwealth legislative power on the subject of banking must never be exercised—it appears to go as far as that—so as to limit or reduce the number of private banks from which the States may seek to borrow money for temporary purposes. That is rested on implication. The Agreement does not preserve anything in statu quo by limiting the legislative authority, and that could not have been intended. An implication of the kind suggested can only be imported in the very clearest type of case.

With regard to the preliminary point, s. 74 of the Constitution is a limitation on the prerogative, and for convenience the type of question there referred to has always been called an inter se question. If one knew no more than what appeared from the form of the declaration and the order of the High Court in the present case there would be nothing whatever to show that there was any infringement of s. 74 by the present appeal. We are appealing from that declaration and order. Of course, behind the form is the substance of the matter. It is submitted, looking behind the formal position, that an analysis of the judgments below shows that the attack on the validity of s. 46 succeeded on the ground of conflict with s. 92 of the Constitution and failed upon other grounds. The importance of that is that s. 74 does not require a certificate of the High Court as a condition of appeal unless it is established that the appeal is "from a decision of the High Court upon "any question, howsoever arising, as to the limits inter se." It is submitted that behind the form here the substance makes it perfectly plain that the appeal is not one from a decision upon an inter se question. First of all, the decisions of the Privy Council themselves show that the question whether s. 46 offends against s. 92 of the Constitution is not a question as to the limits inter se: *James* v. *Cowan* (1). It is conceded by us for the purposes of this appeal that the other three questions, namely, the question of the power under s. 51 (xiii)—whether s. 46 is a law with respect of banking; secondly, whether there is an implication to be derived from the nature of the Constitution that the State functions cannot be impeded to a substantial degree, and whether s. 46 amounts to such an impediment; and thirdly, the question raised by reference to the Financial Agreement, are all questions as to the limits inter se: whether s. 46 offends against s. 92 is not: *James* v. *Cowan* (1); *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (2). If, therefore, s. 46 is decided to be invalid by reason of s. 92, and that alone, it would not be a question as to the limits inter se according to the authorities, and there would therefore be no prohibition under s. 74 against the exercise by the King of the prerogative of appeal. It is from the High Court's decision on the question whether s. 46 offends against s. 92, and on no other question, that this appeal is being brought. The words of s. 74 are clear and require to be given their ordinary and natural meaning. The Privy Council is entitled to look, not merely at the formal order of the High Court, but at the reasons, for the purpose of ascertaining what questions were decided by the court as leading up to the formal order. By requiring a certificate on a particular type of constitutional question, it is submitted that the Parliament at Westminster has postulated that there may be an appeal from the High Court to the Privy Council on all constitutional questions other than inter se questions, which are questions of what may be called domestic jurisdiction, disputes between the Commonwealth and State legislatures or executives or State and State legislatures or executives. It is a limited class of constitutional controversy which is put in this special category. [Reference was made to Quick and Garran's Annotated Constitution, 1901, p. 755.] There is no decision of the High Court on an inter se question adverse to the appellants, and the way is then clear so far as s. 74 is concerned. The exposition of the matter in

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(1) [1932] A. C. 542, 559–60.

(2) [1917] A. C. 528.

Baxter v. *Commissioners of Taxation* (1) should be regarded practically as conclusive.

The view that the appellants are precluded from this appeal because before this Board either as a matter of right or of special permission the respondents can raise certain questions including inter se questions, is a view which is not supported by the words of s. 74, even though inter se questions were raised in the court in Australia. *James* v. *The Commonwealth* (2) is an illustration of the general position that there may be wrapped up in a case an inter se question which is entangled in the litigation, and that does not debar an appeal to the Privy Council unless the High Court has made a decision on it and unless the appellant is questioning it in the Privy Council. An illustration of the type of certificate which is granted—and it is the only case in which there has been a certificate given—is *Colonial Sugar Refining Co., Ld.* v. *Attorney-General for the Commonwealth* (3). If it is clear that either the High Court has already decided an inter se point in such a way that appealing on a non-inter se question, the appellant should win the whole case if he wins on that question, or, alternatively, if the High Court has not decided the inter se question because they have decided the case on other grounds, then in either case the Board could, on an appeal, if it wished as a matter of discretion, decide the non-inter se question and make an order covering the whole case, or, alternatively, remit the case to the High Court to complete. The position of the appellants here is clear, and as far as the practice both in the Privy Council and the High Court goes in considering petitions for special leave and applications for a certificate respectively, the practice, it is submitted, supports the view of s. 74 for which the appellants are contending: the *Colonial Sugar Refining Co.'s* case (3); *Minister for Trading Concerns* v. *Amalgamated Society of Engineers* (4); *James* v. *The Commonwealth* (2).

The respondents' first contention here is that s. 74 means that if the relief asked for by the appellants cannot be granted in a particular case without deciding an inter se question, then the prohibition of s. 74 applies. That, it is submitted, means rewriting the section in a way which is irreconcilable with its words if they are read in their ordinary sense. The process of cutting up, amputating, rewriting or amending

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(1) (1907) 4 C. L. R. 1087.
(2) [1936] A. C. 578.
(3) (1912) 15 C. L. R. 182, 235.
(4) [1923] A. C. 170.

s. 74 should not be adopted; it should be interpreted by asking whether there was a decision of the High Court on an inter se question; if there was, then the case can come to the Privy Council if a certificate is granted, both the inter se question via the High Court certificate and the non-inter se question via special leave. It does not matter which is the first step in the process. In the *Colonial Sugar Refining Co.'s* case (1) the High Court, having given a certificate, the Privy Council subsequently granted special leave to cover the non-inter se questions which might arise, so that the whole matter could be dealt with. That is, it is submitted, from beginning to end the way in which both the Privy Council and the High Court have regarded this matter.

Passing now to the main point in the appeal, whether s. 46 is in conflict with s. 92 of the Constitution, our main contentions are: (*a*) Section 92 has no relevance whatever to such a law as is contained in s. 46, i.e., a law which regulates the business of banking in Australia by selecting, or empowering the selection by the Treasurer of, those who may and those who may not engage in the business of banking in Australia. (*b*) Whether or not banking is trade, commerce or intercourse within the meaning of s. 92, s. 46 of the Banking Act does not interfere with the freedom guaranteed by s. 92. (*c*) In any case, banking is not trade, commerce or intercourse, and for this further reason s. 46 does not offend against s. 92. There is a very large field of case law in connexion with s. 92. In *W. & A. McArthur, Ld.* v. *State of Queensland* (2) it was held, although the Commonwealth was not a party to the litigation, that the Commonwealth was not bound by s. 92 of the Constitution. After many years of litigation dealing with different subjects, the question came before the Privy Council in *James* v. *The Commonwealth* (3) when it was held, firstly, that the Commonwealth was bound by s. 92, and secondly, that the particular restriction imposed by the Commonwealth legislature in that case was almost identical with, or closely analogous to, a restriction previously held invalid in *James* v. *Cowan* (4). *James* v. *The Commonwealth* (3) is, it is submitted, binding on the courts in Australia and, from every practical point of view, on the Privy Council, and it answers every question of principle that arises in the present case. The view taken in that case was that s. 92 means on its true construction

(1) (1912) 15 C. L. R. 182, 235.
(2) (1920) 28 C. L. R. 530.
(3) [1936] A. C. 578.
(4) [1932] A. C. 542.

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that no burden, hinderance or restriction should be imposed on, or in relation to, the crossing of the inter-State frontier. That, of course, is a question of fact; in some cases it may be a question of degree. One may have to pierce behind forms to find what is really being done, but the rule is: freedom at what is the crucial point in inter-State trade, i.e., at the State barrier. The area protected is enormously contracted from that deemed to be protected in *McArthur's* case (1); the Board made it plain that the conception of *McArthur's* case (1) applying freedom to each and every portion of inter-State trade was erroneous. If one finds burdens or restrictions imposed at or in relation to the passage of goods across the border in the course of trade or intercourse, then, and only then, does s. 92 apply.

There cannot be a piece of legislation further removed from that principle than that in this case, where all that there is is a system of determining who shall conduct the business of banking in Australia under the constitutional power to deal with banking. The enactment here in question is of a type which was approved in *James* v. *The Commonwealth* (2) by way of illustration in relation to the postal monopoly, the wireless telegraphy monopoly and the system of selecting those who are to be preferred in performing work as instruments in inter-State trade in connexion with shipping. [A number of the earlier cases were then referred to as illustrations indicating the competing conceptions as to the construction of s. 92.] It was said in *McArthur's* case (1) that a trade, for the purpose of s. 92, includes the mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and delivery. That view was overruled in *James* v. *The Commonwealth* (2). The true meaning of s. 92 is that "trade and commerce" are in a context guaranteeing absolute freedom, not to persons, but absolute freedom of trade, commerce and intercourse among the States, and the arrangement looks towards the borders; it looks towards the passage of goods and persons over the border and the prohibition is directed towards that and not towards all the accessory methods and all the things that bring that into existence, for if the latter were the position the Commonwealth could not pass effective laws under s. 51 (i) at all. The question in *James* v. *Cowan* (3) was the true relationship

(1) (1920) 28 C. L. R. 530.
(2) [1936] A. C. 578.
(3) [1932] A. C. 542.

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between a power of acquisition of property and the protection given by s. 92. *State of New South Wales* v. *The Commonwealth* (1) (the Wheat case) has to be distinguished from *James* v. *Cowan* (2). The view of the Chief Justice in the Wheat case (1) was that the mere acquisition of property from the grower or the farmer or the merchant taken over by the State was in all cases an answer to a suggestion that s. 92 had been infringed. We would say now, looking at *James* v. *The Commonwealth* (3) and *James* v. *Cowan* (2) that the enactment in the Wheat case (1) did not impose a prohibition or a restriction in relation to the passage of goods across the border. What it did was to put the disposition of the goods entirely with the new owner, the Government. It is a unanimous decision and, it is submitted, a correct one, to the effect that an acquisition of a commodity which is to a very great extent the subject of trade, including inter-State trade, does not constitute an infringement of s. 92, although in the popular sense one could say that in such a case there must be, and clearly was, a disturbance of business. It is submitted that subsequently, in *James* v. *The Commonwealth* (3), the Privy Council really approved the decision in the Wheat case (1). If the Wheat Act, a general law of the State giving the ownership and control of the wheat to the State, is not infringed by s. 92, that takes the appellants a good deal of distance in principle.

A case after *James* v. *The Commonwealth* (3) was *Andrews* v. *Howell* (4), in which it was held that the National Security (Apple and Pear Acquisition) Regulations did not contravene s. 92. The acquisitions in that case were upheld, but since then there have been a great many acquisitions by the Commonwealth on a Commonwealth-wide basis, and undoubtedly including in their scope many commodities. The flow of trade is such that a general acquisition, if there were no more, would undoubtedly involve some interference in fact with trade across the border, but, it is submitted, that is not the kind of interference which is forbidden in s. 92. A case of much greater importance is *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty., Ld.* (5), which in some aspects is crucial in the determination of the present case so far as s. 92 is concerned. The Chief Justice in the present case said that the *Milk Board* case (5) will have to be overruled if the claim

(1) (1915) 20 C. L. R. 54.
(2) [1932] A. C. 522.
(3) [1936] A. C. 578.
(4) (1941) 65 C. L. R. 255.
(5) (1939) 62 C. L. R. 116.

of the respondents in this case were conceded. In the *Milk Board* case (1) it was held that the establishment of the monopoly in the circumstances of the case was valid. *James* v. *The Commonwealth* (2) was correctly applied. The restriction, such as it was, was not a restriction or burden imposed in respect of the crossing of the State frontiers. There is nothing in that decision, or in decisions of the Privy Council, to make a compulsory marketing scheme invalid because of s. 92. In a word, there is no real restriction imposed in relation to the passage of goods from State to State, but rather the contrary. Summing it up in a popular way, one hits the trader across the border in *James* v. *Cowan* (3), but the *Milk Board* case (1) does nothing of the kind; on the contrary, it gives to the producer a chance of a fair return on his product which he would not get as an individual. That cannot be an interference with the freedom of the border. If there are, e.g., elements of disease—as in *Ex parte Nelson No.* 1 (4)—the State is not precluded as a general principle from protecting its citizens. The principle in that case is sound, and if in substance the restriction is related to the protection of the people against disease or contagion that would not be deemed a restriction within the meaning of the rule in *James* v. *The Commonwealth* (2). The restrictions imposed in *Nelson's* case (4) were rightly held to be valid, and the decision in *Tasmania* v. *Victoria* (5), where the restrictions were found to be unreal and not related to health, is equally correct.

It is submitted that the fixing of the price of a commodity in inter-State trade is within the jurisdiction of the State or Commonwealth in relation to inter-State trade, and the consequences are far-reaching. *James* v. *The Commonwealth* (2) is a clear and binding decision to the effect that the rule of s. 92 that no restrictions may lawfully be imposed by State or Commonwealth on or in relation to the passage of goods from State to State is not infringed by a law which fixes the price to the seller of goods, although those particular goods may be solely in inter-State trade, and the particular person who sells them engages solely in inter-State trade. That means, of course, that inter-State business is subject to regulation, and there could not be a stronger case of interference

(1) (1939) 62 C. L. R. 116.
(2) [1936] A. C. 578.
(3) [1932] A. C. 542.
(4) (1928) 42 C. L. R. 209.
(5) (1935) 52 C. L. R. 157.

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with a trader's contractual freedom than direct fixation of the price he is to get for his article. The decision in the *Milk Board* case (1) is clearly inconsistent with the claim that s. 92 guarantees the continuance of individual rights or businesses. The Commonwealth in the acquisition cases has always submitted that when one looks at the acquisition of a character similar to that in the *Peanut Board* v. *Rockhampton Harbour Board* (2) there is no infringement of s. 92, even though the individual grower is not permitted to sell his product in the sense that he can claim a constitutional right to do so, but must sell it through the selected agency, the Government. That is not a restriction imposed in relation to the passage of goods across the frontier within the meaning of *James* v. *The Commonwealth* (3). The *Peanut Board* case (2) is completely in conflict with the *Milk Board* case (1). The point to determine is what is the restriction, and *James* v. *The Commonwealth* (3) determines it ; there is no room after that case, where every test was considered before the final test was adopted, for the overriding doctrine of a personal right given by s. 92 to conduct inter-State trade. If that doctrine of a personal right is negatived, and assuming that banking is trade, then the case for the respondents on s. 46 of the Banking Act breaks down.

The most recent decision of the High Court in connexion with acquisition, given since their decision in the present case, is *Field Peas Marketing Board (Tasmania) and Another* v. *Clements and Marshall Pty., Ld.* (4), a case somewhat analogous to the *Peanut Board* case (2). The Full Court was equally divided in opinion, and in the result the decision of Williams J. holding the scheme invalid was affirmed. All these production plans, where the commodity is taken away at the earliest moment so that it can be sold to the best advantage and in the interests of the producers, are not restrictions upon or in relation to the frontier, and it is erroneous to apply s. 92 unless it can be said positively that this particular restriction is imposed at the crucial point of inter-State trade or in respect of it. There is no other test ; the trouble is that after *James* v. *The Commonwealth* (3) first the test is applied and later on it is not. In *Hartley* v. *Walsh* (5) it was held that the regulations there in question did not conflict with

(1) (1939) 62 C. L. R. 116.
(2) (1933) 48 C. L. R. 266.
(3) [1936] A. C. 578.
(4) (1948) 76 C. L. R. 415.
(5) (1937) 57 C. L. R. 372.

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s. 92 as interfering with the freedom of inter-State trade; that case is a correct application of *James* v. *The Commonwealth* (1). One sees emerging from the latter case that inter-State commerce can be regulated—by Commonwealth or State. Every regulation on any topic carries with it a power to prohibit for the purpose of regulation. Another case which applies *James* v. *The Commonwealth* (1) is *Home Benefits Pty., Ld.* v. *Crafter* (2), a case of a Trading Stamps Act prohibiting the practice of supplying coupons with goods and subsequently supplying other goods in exchange for the coupons. The view taken by the majority was that that coupon system of trading was an illegitimate form of trading.

The next cases to be referred to are the transport cases, which are of supreme importance and affect the present case very directly. If, as is submitted, there is power in the State to co-ordinate the service of transport within its borders, to issue orders as to how transport shall be controlled and organized for the more efficient transporting of goods and persons, and if co-ordination schemes of that kind are not invalidated by s. 92, that has a direct and obvious bearing on the solution of the present case. [Reference was made to *The King* v. *Vizzard*; *Ex parte Hill* (3) and *Willard* v. *Rawson* (4).] There are several references in *James* v. *The Commonwealth* (1) to *Vizzard's* case (5), and it is submitted that the Privy Council accepted the transport cases and the reasoning of them. The majority judgment in *Vizzard's* case (5) is very closely analogous in principle to the present case, and if the reasoning is sound, it is submitted that it covers this case. *Vizzard's* case (5) was followed by *O. Gilpin, Ld.* v. *Commissioner for Road Transport & Tramways (N.S.W.)* (6), in which the majority of the court took the view that s. 92 did not apply to the case. There are several other cases, all on transport, which are further illustratons of, and drive right home the principle of, *Vizzard's* case (2) and *Gilpin's* case (6): *Bessell* v. *Dayman* (7); *Duncan and Green Star Trading Co. Pty., Ld.* v. *Vizzard* (8), which again illustrates the principle that the imposition of limitations of choice as to the means of land transport is not inconsistent with s. 92. It is essential to my argument to make it clear that the correct-

(1) [1936] A. C. 578.
(2) (1939) 61 C. L. R. 701.
(3) (1933) 50 C. L. R. 30.
(4) (1933) 48 C. L. R. 316.
(5) 50 C. L. R. 30.
(6) (1935) 52 C. L. R. 180.
(7) (1935) 52 C. L. R. 215.
(8) (1935) 53 C. L. R. 493.

ness of the transport cases was accepted and affirmed in *James* v. *The Commonwealth* (1). [Reference was also made to *Riverina Transport Pty., Ld.* v. *State of Victoria* (2).] The fact is that since 1937 all the transport enactments in the States have remained unimpaired and without being challenged, and their validity should be accepted in determining the present case. There must be finality in the interpretation of a section such as s. 92, and nothing could be worse for the administration of the law than to admit of anything which would shake adherence to the principles laid down, and accepted by the Privy Council, in the transport cases.

Huddart Parker, Ld. v. *The Commonwealth* (3) was a licensing system case, and also involved employment in inter-State operations; it is a decision that the selection of persons to perform the work which is part of, and, indeed, an integral part of, the inter-State carriage of goods in the course of inter-State trade is a matter within the legislature's discretion. Applying the rule in *James* v. *The Commonwealth* (1) the restriction is a prohibition of those who are not selected in the case of *Huddart Parker* (3), but that is the type of prohibition law the Commonwealth can impose in passing laws with regard to inter-State trade without infringing s. 92, which only prescribes prohibition in respect to the passage of goods across the frontier. Section 92 was not discussed in *Huddart Parker's* case (3) because at that time it was assumed that it did not bind the Commonwealth. It is submitted that the transport enactments of all the States and the Transport Workers' Act of the Commonwealth in relation to inter-State trade are not invalidated. Not one of them is deemed to be invalid by reason of s. 92, although they all select instrumentalities, agencies, actors, in connexion with trade or carriage without any interference, if that expression may be used, with the freedom of the border.

The next case, *Gratwick* v. *Johnson* (4), which represents a completely new stage in the development of the law in relation to s. 92, cannot arise again directly, but it is a test case of the application of the principle. The order in question, made under the National Defence Regulations, a Commonwealth enactment in exercise of the defence power under s. 51 (vi) of the Constitution, prohibited movement of persons in certain respects, other than defence personnel, from State to State, to the Northern territory of Australia, and to or from any border station, without the consent of the Director-General of Land Transport. The court held that that was an infringement of s. 92, it is submitted wrongly, although it related to inter-State travel. The purpose of it was such that no restriction in relation to the border control under s. 92 was really being attempted at all. What was being done was that in connexion with the trains providing inter-State travel this system of priorities was being put into force. If that is correct it links up very closely with the previous problem of the actual prohibition of the importation of certain types of deleterious goods into a State. It is true that in those cases there is a restriction on movement of commodities inter-State, but there too, in truth those are not enactments the substance of which is to restrict inter-State trade at all. In other words, inter-State trade and everything else was in peril, the whole life of the community was in peril at the time, and to meet the peril these measures, amongst others, were taken. Section 92 is referring to restrictions imposed which are of a commercial character relating to intercourse between States, and not to a situation of the character in *Gratwick's* case (1).

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(1) [1936] A. C. 578.
(2) (1937) 57 C. L. R. 327.
(3) (1931) 44 C. L. R. 492.
(4) (1945) 70 C. L. R. 1.

The next case, *Australian National Airways Pty., Ld.* v. *The Commonwealth* (2), is extremely important. Under the Air Lines Act, 1945, provision was made by the Commonwealth Parliament for establishing a Government Air Lines Commission authorized to operate exclusive inter-State services. The Act provided that if the Commission established an adequate service on any route, the existing licence of the private air line operator would terminate. It was held by the court, first, that the provisions establishing the Commission for the purpose of its conducting an inter-State service by air were valid, but, secondly, that the provisions which gave to the Commission a monopoly in connexion with inter-State air service after an adequate service had been established was contrary to s. 92, and it was also held that reg. 79 giving the discretionary power to licence an aircraft or a service was also invalid. It is submitted that there was a failure to apply the test of *James* v. *The Commonwealth* (3), and that on s. 92 the judges substituted a series of novel tests which have no basis either in *James's* case (3) or in any other decisions. It is plainly and simply, from the point of view of the Commonwealth, an attempt to rationalize the whole service inter-State by air, and it is submitted that it is completely covered in principle by the land transport cases. Competition between those who engage in the service of transport, and the restriction and the exclusion of competition, is completely irrelevant to the purpose of s. 92. What s. 92 is looking to is not the business as such at all; it is looking to what may emerge from the business—what may take place in the course of it. One must hold fast to the fact that the area to which s. 92 is addressed is not the whole area of inter-State trade, and therefore it can give no special immunity to the business so organized and so conducted. The mere closing down of a business by the operation of a State or a Commonwealth enactment, that business being a two-State business carried on on inter-State lines, is not an Act forbidden to the States by s. 92, and if we prove that, it would end this case. The decision that the Act in the *Airways* case (1) was an infringement of s. 92 was incorrect. This is a crucial point in the case, because of the close analogy in some respects between the *Airways* case (1) and the present banking case.

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(1) (1945) 70 C. L. R. 1.
(2) (1945) 71 C. L. R. 29.
(3) [1936] A. C. 578.

It has been said that banking is to be identified with trade and commerce. No one disputes its great importance to trade and commerce; no one disputes that bankers carry on a trade, just as almost every organized business is a trade, but now it is suggested that another word can be added to s. 92, so that it would read "banking among the States, "whether conducted by internal carriage or ocean navigation, "shall be absolutely free." It is even worse than that; s. 92 is looking to the flow of trade—one can speak of the flow of trade across a border, and similarly with commerce and intercourse—but the business of banking, which alone is the subject of s. 46, is centred somewhere; it is not a thing which in itself moves. It provides facilities, and in the course of a banking business moneys are remitted, but the essence of banking is the relationship which is brought into existence at the time of the deposit. That is the core of banking. It is a business which causes and produces results of many characters, including transactions of an inter-State character. Ten to fifteen per cent. of the whole of the transactions of these banks are said to be of an inter-State character. In other words, because the remittances of money are to that extent

(1) (1945) 71 C. L. R. 29.

it is said that the business of banking, not those transactions themselves, is given constitutional immunity by s. 92 and that it cannot be stopped. That is a proposition for which there is no authority; it is quite inconsistent with the test in *James* v. *The Commonwealth* (1). It is fundamental in this case that the business of banking, localized either at a central office or a central office plus branch offices, is further removed from the flow of trade and commerce across the border than the transactions and acts and dealings which were referred to in *McArthur's* case (2) and which, erroneously, as the Privy Council pointed out, it was asserted were all entitled to freedom.

It is proposed now to restate what, it is submitted, is the relevant decision in *James* v. *The Commonwealth* (1) and then apply it directly to s. 46 of the Banking Act. The first point is that trade and commerce do not cover the same area in s. 51 (1) and s. 92 of the Constitution. It is stated expressly in *James* v. *The Commonwealth* (3) that the range covered by s. 92 is narrower. Secondly, the meaning of s. 92 is stated in that case to be that neither State nor Commonwealth is permitted to impose obstacles as at the frontier—that is the narrow area to which the first proposition relates, not the whole area of Inter-State trade at all—and the prohibitions or burdens, etc., must be in respect of, or because of, the passage of goods or persons across the frontier or border in the course of inter-State trade, commerce or intercourse. The true concept of s. 92 which is adopted in *James* v. *The Commonwealth* (3) is one of trade being in motion, and commerce and intercourse being in motion, and actually passing over the frontiers. The conclusion is that apart from the command in relation to the border contained in s. 92, inter-State trade as such, and trade generally, may be prohibited, restricted, controlled or burdened in any way that seems fit to the relevant law-making authority. *James* v. *The Commonwealth* (3) has all the relevant illustrations of cases where the enactments are not infringements of s. 92 but constitute an exercise of this general law-making authority of the Commonwealth or the States. It emerges from the analysis of *James's* case (3) that s. 92 was not intended to establish, apart from the actual crossing of the border in the course of trade, commerce and intercourse in being, any special constitutional protection, preference or

(1) [1936] A. C. 578.
(2) 28 C. L. R. 530.
(3) [1936] A. C. 578, 632.

privilege for those engaged in Inter-State trade as such, or in businesses organized for the purpose of carrying on inter-State transactions.

As air, rail and land transport may be co-ordinated by State law with direct consequences to the inter-State trade, including the inter-State carrier, preventing him, perhaps, from carrying on his business, so that same principle applies to every subject of law. If it can be applied in the case of trade and traffic among the States, it must apply a fortiori to subjects which are further removed from that concept, subjects like banking or insurance or trade marks, or matters of that kind. There may be extreme cases in which the court would regard the real object of co-ordination of transport or monopoly legislation as being interference with the passage of goods or persons across the border. That, however, is exceptional; it is a case of the *James* v. *Cowan* (1) kind, where expropriation was of a very special character. If this additional element of interference with the passage across the border has to be shown, the burden of doing so is on those who challenge the validity of the law. An argument advanced by the respondents is that if a person or corporation is engaged in inter-State trade, then no law can prohibit him from conducting business. That proposition is really at the heart of the respondents' case, but *James* v. *The Commonwealth* (2) destroys it.

With regard to the effect of the rule in *James* v. *The Commonwealth* (2) on the Banking Act, it is submitted that, applying that rule, it cannot be said that s. 46 imposes prohibitions, restrictions or burdens in respect of the passage of goods or persons across the frontier. Such a law, which selects participants to do the business of banking, and does so on an Australian-wide basis for the peace, order and good government of the Commonwealth in respect of banking, cannot be regarded as having anything to say with regard to the passage of commodities or persons across the frontier, with which alone s. 92 is concerned. There could not be an enactment which is more clearly not infringing s. 92; it is stronger than any of the cases which have been cited in argument. The business of banking covers every possible phase or combination of deposit, custody, investments, loan, exchange, issue and transmission of money. It is wide enough to embrace every person, partnership or corporate body carrying on business in money. It also includes dealing in credit: *Attorney-General for Alberta* v. *Attorney-General for Canada* (1). There is no reason why in practice Parliament should not decide that the post office is to be conducted by the Government, and yet one gets something even more important to trade and commerce and manufacture, and the life of the community in relation to banking. If Parliament determines to substitute a publicly owned utility for private operators, that is a legislative choice, and the prohibition of the private operators, either as a group or individually, provides no ground for inferring any purpose directed against inter-State trade, or, indeed, any adverse effect on it at all.

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(1) [1932] A. C. 542.

(2) [1936] A. C. 578.

The view taken in the present case by the Chief Justice and McTiernan J. is correct, namely, that the business of banking is not to be identified with trade, commerce and intercourse in being or in motion, which is protected by s. 92, in its passage across the frontier, and that therefore banking becomes not trade, commerce and intercourse itself for that purpose, but a facility or instrument very important for use in connexion with trade and commerce. The proposition that s. 92 confers a personal right on individuals to engage in trade or commerce among the States should not be accepted. It is not denied for a moment that there is protection conferred on individuals by s. 92, but that is only as incidental to the broad purpose of s. 92, which ensures the free movement of goods and persons between States. The service of banking in relation to inter-State trade is not so closely related that a law determining those who are to conduct the business of banking can be regarded as a restriction in relation to the passage of goods or persons across the border. The importance of this case goes far beyond the immediate operation of s. 46.

With regard to severability, in view of the terms of s. 15A of the Acts Interpretation Act, 1901-41, and of s. 6 of the Banking Act itself, it is submitted that so much of the Banking Act as can operate constitutionally shall so operate legislatively. That might give rise to border-line cases of great difficulty, but this is not such a case. What Parliament has said in effect in s. 6 is that the holding invalid of certain provisions may result in an Act which is apparently different in substance from the Act as it leaves Parliament, but that is the Act which we pass. It is submitted that s. 46, sub-ss. 4 to 8, is severable. Section 46 is not dependent on the putting into operation of any other provision of the Act. [Reference was

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(1) [1947] A. C. 503.

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made to *Australian Railways Union* v. *Victorian Railways Commissioners* (1) and *Pidoto* v. *State of Victoria* (2).] The whole of s. 46 is valid, though the essential sub-sections from the appellants point of view are (4) to (8). In conclusion, the decision of the Board in *James* v. *Commonwealth* (3) should be applied, and it should be declared in an appropriate form that s. 92 does not invalidate s. 46 or any part of it.

Pritt K.C. and *Gahan* for the intervener States of New South Wales and Queensland. We support the argument of the Commonwealth on s. 92, but we have no interest or instructions to take part in any other section of the argument. If s. 92 is to have the wide interpretation given to it by the majority of the court below there are four or five specific fields of legislation in which the States are interested which are threatened, such as price fixing, controls, and particularly licensing controls of a great many different varieties of business activities, the operation of pooling schemes in some commodities, direct dealing with products, the merchandizing and marketing of products, and lastly, the matter of transport, which the States do feel are of the greatest importance to them. This is not an easy case in which to state general principles, but it does emerge quite clearly that there has been, and still is, a battle between two tendencies or two schools of thought about s. 92, and in that battle we are on the Commonwealth's side because we want to keep our reasonable powers just as the Commonwealth wants to keep its. The school which we seek to defeat is that which, beginning by taking a rather narrow view of the words "absolutely "free," does produce a broad treatment of freedom which in a political field would be called anarchy. The other school wants to make a workable reality of the trade adjustments between the members of the Federation and the Federation itself. It is submitted, first, that the controversy was really settled in *James* v. *The Commonwealth* (3). The respondents are really attempting to re-impose on the States and on the Commonwealth the fetters from which they were freed in *Vizzard's* case (4). The States naturally do not want any revival of the doctrine of *McArthur's* case (5) which, it is submitted, was destroyed by *James* v. *The Commonwealth* (3). *James's* case (3) did seem to lend some approval to the decision

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(1) (1930) 44 C. L. R. 319.
(2) (1943) 68 C. L. R. 87.
(3) [1936] A. C. 578.
(4) 50 C. L. R. 30.
(5) 28 C. L. R. 530.

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in the *Peanut Board* case (1), but it should be made clear that if the *Peanut Board* case (1) goes any further than your Lordships then thought, it is not good law. It ought also to be made clear that the *Field Peas* case (2) also goes too far. The cases the intervener States do support are the *Milk Board* case (3) and the transport cases, and ask the Board to approve them.

With regard to the construction of s. 92, the Board in *James* v. *The Commonwealth* (4) defined freedom of trade in a way which was a clear decision in favour of the school for which the appellants stand. In view of the decision of the Board on that point it is impossible to advance any one of the three contentions the respondents put forward, namely, first, the notion that s. 92 provides for a sort of universal freedom of competition, secondly, that it provides for the economic doctrine known as laissez faire, thirdly, that it estabishes, by some mysterious application, a constitutional right in every citizen of Australia to insist on trading across a frontier in anything he likes and whatever a legislature may say in the effort to stop him. Evatt J. took part in a decision of some fourteen cases which dealt with s. 92: the *Peanut Board* case (1), in which he dissented; *Willard v. Rawson* (5); *Vizzard's* case (6)—this Board did in substance in *James* v. *The Commonwealth* (4) approve the judgment of Evatt J. in *Vizzard's* case (6); *Tasmania* v. *Victoria* (7); *Gilpin's* case (8); the *Riverina Transport* case (9); *Hartley* v. *Walsh* (10); the *Milk Board* case (3); and *The King* v. *Martin; Ex parte Wawn* (11). [Reference was also made to *Roughley* v. *State of New South Wales; Ex parte Beavis* (12).] The Board, as submitted, approved the judgment of Evatt J. in *Vizzard's* case (6) and everything that has been said to the contrary of his views in Australia since is merely an attempt to escape from *James* v. *The Commonwealth* (4), an attempt which this Board should now correct in its application to the present case. The construction of s. 92 contended for by the respondents and accepted by the majority in the court below leaves a dangerous gap in the legislative authority of all the legislatures in

(1) 48 C. L. R. 266.
(2) 76 C. L. R. 415.
(3) 62 C. L. R. 116.
(4) [1936] A. C. 578.
(5) 48 C. L. R. 316.
(6) 50 C. L. R. 30.
(7) 52 C. L. R. 157.
(8) 52 C. L. R. 189.
(9) 57 C. L. R. 327.
(10) 57 C. L. R. 372.
(11) 62 C. L. R. 457.
(12) 42 C. L. R. 162.

Australia. The true construction of the section as already determined by the Board is one which does not leave a gap, and imposes no more restrictions than those obviously intended by the fathers of the Constitution and effectively stated, so far as they can be crystallized, in *James* v. *The Commonwealth* (1). When one begins to consider what is the effect of a section which says that there shall be freedom for goods at the frontier on an Act which sets out to nationalize the activity of banking, or s. 46 of it, the first mental reaction must be, " what have those two things to do with one another, " they are not even in the same field."

By the Banking Act banking is not being interfered with at all ; people are being selected who shall carry on banking in the future, including the removal of those who have carried it on in the past—that is not saying that banking shall be stopped or altered in any way. Earlier cases which stated that s. 92 could not be confined to financial burdens on goods crossing the frontier were *Foggitt, Jones & Co., Ld.* v. *State of New South Wales* (2), *Duncan* v. *State of Queensland* (3) and *McArthur's* case (4). The intervener States support the argument of the appellants on s. 92 because in their submission the majority judgments in the High Court in this case seek, first, to overthrow the authority of, and decisions in, the transport cases, which are important to the States ; secondly, they apply the majority decision in the *Peanut Board* case (5) in the broad form stated by Dixon J., and not in the qualified form in which this Board appeared to endorse it ; and thirdly, they really attempt to revive the principles formulated in the dissenting judgment of Dixon J. in *Gilpin's* case (6). The Chief Justice in the present case said that that would go a long way towards restoring the principles laid down in *McArthur's* case (4).

Sir Walter Monckton K.C., *Sir Cyril Radcliffe K.C.*, *G. E. Barwick K.C.*, *F. W. Kitto K.C.*, *E. G. Coppel K.C.* (the last three of the Australian Bar), *Sir Valentine Holmes K.C.*, *Diplock K.C.* and *B. MacKenna* for the respondents to the first and second appeals (the respondent banks).

Sir Cyril Radcliffe K.C. It is common ground that most of my argument covers the objection on behalf of all respondents. Our submission is that this appeal as to the validity of s. 46

(1) [1936] A. C. 578.
(2) (1916) 21 C. L. R. 357.
(3) (1916) 22 C. L. R. 556.
(4) 28 C. L. R. 530.
(5) 48 C. L. R. 266.
(6) 52 C. L. R. 189.

of the Banking Act is incompetent in view of the terms of s. 74 of the Constitution, since the appellants have not elected, as they should have done, to ask the High Court for its certificate that the inter se questions which must be decided on the validity of s. 46 are proper ones to be referred to this Board. It is hoped to establish that this bare power in the Treasurer in s. 46 to stop this or that bank is not within the legislative power conferred on the Commonwealth by s. 51 (xiii) —that it is not in truth and in substance as such a law with respect to banking; it is something much more like a bill of attainder with regard to individuals. It is hoped also to satisfy the Board that quite apart from that question, on the true construction of the Act s. 46, the alleged independent power of prohibition, is not an independent power at all, and that on the face of the whole Act, which is to be read as a whole for this purpose, it was only to be applied as an appendage to the acquisition with compensation which the Act avowedly intended to effect. On any other construction it is plainly one of those unjust terms of acquisition, since it arms the intending acquirer with far too great a power for fairness and should be struck down for that reason, just as the management provisions of the Act empowering an acquirer to take over the management and control of these businesses before they were sold, were struck down as giving the intending acquiring authority too great a power for fairness. Although the appeal may fail on the ground that the appellants do not satisfy the Board that the court below has misunderstood the meaning of s. 92, it cannot succeed without the Board hearing argument on, and deciding, those other and, indeed, prior inter se questions, because they go to the root of power.

In his construction of s. 74, Dr. Evatt appeared to throw all the weight on the question whether in arguing his case before this Board an appellant desires the Board to take a different view on an inter se question from that taken by the numerical majority of judges in the court below. He extracts that meaning from s. 74. It is submitted that at what stage of an appeal an appellant, in order to succeed, may have to launch upon inter se questions is quite irrelevant in a constitutional provision of this kind. What matters is whether for the giving of the relief which he asks for by appeal the Board is or is not fairly compelled to consider inter se questions on appeal from the High Court. Dr. Evatt's argument for what, it is submitted, is really an impossible construction of the words used in s. 74 was based, apart from the actual words of the section, on *Baxter's* case (1). The view expressed by the majority in that case is unmaintainable. The " decision " must mean that which the court as a court has ordered in some form or other and that which the appellant wishes to have reversed or modified in his favour.

It is common ground that the issues as to the constitutional power under s. 51 are properly described as inter se questions, and it is common ground that the questions whether the Banking Act trenched on the immunity or the sovereign position of a State in a way that is impermissible under the Constitution, or whether it amounted to a breach of the constitutional provision with regard to the Financial Agreement, are also inter se questions.

The total effect of s. 74 can only be appreciated if one decides in turn what is meant in that section by the words " appeal," " decision," and " upon." " Appeal " in s. 74 must mean an application under which one party to a suit (unless it be a criminal matter) asks the King in Council to have the act of the court from which he appeals reversed or varied in his favour. " Decision " in the phrase " appeal . . . . from " a decision of the High Court " must be a word of art, and no doubt it must be a compendious phrase for that larger, more detailed phrase, " judgments, decrees, orders and sentences," which has been used in s. 73. Also, in the foundation Act of the jurisdiction of the Judicial Committee—the Judicial Committee Act, 1833—wherever " decision " is used it is a comprehensive phrase for the act of the court appealed from. [Reference was also made to the preamble and ss. 10 and 11 of the Judicial Committee Act, 1844.] There is a recognition of the essential difference between the reasons of the judge and the judgment pronounced which the appeal is from. The meaning of " decision " was also dealt with in *Rajah Tasadduq Rasul Khan* v. *Manik Chand* (2) and the Board came to the conclusion that it meant the act of the court in dealing with the suit before it.

If it be right that " decision of the High Court " means the act of the court in dealing with the suit and not anything else, then one has to advance to a solution of the meaning of the word " upon " in that premise. There may be two readings, which come to very much the same thing in the end: they must mean this, if it is an " appeal upon a question " it must

(1) 4 C. L. R. 1087.

(2) (1902) L. R. 30 I. A. 35.

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mean an appeal in which the relief sought in respect of the act of the court below cannot be obtained without a decision of that question; in other words, an appeal involving the question. The appellants want the Board to say that the High Court's order that s. 46 is invalid and that the Treasurer must be restrained from acting upon it, is wrong. It is plain that in conducting the appeal asking the Board to alter the order and say that s. 46 is valid and that the Treasurer can act under it, they must ask the Board to consider what the appeal involves, or for your consideration of the question whether there was power to make that enactment, and the other questions relating to the States' position. They are asking the Board to do that without the certificate of the High Court, and to make law on these inter se constitutional questions here for the High Court. The legislative validity under s. 51 of the Constitution of s. 46 is plainly involved in the High Court's decision. One cannot reach s. 92 until it is decided whether there is enacting power under s. 51, and that is the way every judge has tackled it in this case. Whether any particular judge thought that s. 51 authorized it or did not, or whether any collection of their reasons produces a majority one way or the other, is not to the point; the question is whether that inter se question was involved in their decision and is going to be involved in the decision on the appeal. The Attorney-General said that it is absurd that the appellants, who are not seeking to raise any inter se question here, should be compelled to go to the High Court and ask for a certificate as to the question which they do not want to raise and which was decided in their favour. The answer to that is that the appellants cannot succeed without getting a decision on the inter se question and therefore they must get the certificate before they can come here. They have to establish that s. 46 is within the power before they reach s. 92. [Reference was made to *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1), and to Spencer Bower on Res Judicata, 1924 ed., p. 113, in connexion with the meaning of the word "upon."] The key to s. 74 depends on clearly ascertaining what the word "decision" means. "Decision" means the act of the court, and the only question left is upon what questions was this declaration that s. 46 is invalid made. That does not mean the motivation of this judge or that of the members of the court, but the issues which were involved in the order of the court, and which must necessarily be involved before any relief is given in respect of it upon an appeal.

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(1) [1917] A. C. 528.

On the question of severability or inseverability it is submitted that on construction there is not a separate and independent power under sub-s. 4 of s. 46 ; it is a mere pendant to the acquisition of the businesses of the private banks which the Act was intended to achieve. Section 6 is not intended to affect construction ; it is nothing more than a declaration of the intention of Parliament ; it is not itself enacting, and cannot be. It is not for Parliament so to express itself as to leave to the High Court the power in effect of making legislation which it has not made itself. All it can do with this declaration of the intention of Parliament before it is to attribute to the declaration the maximum effect that can be given to it consistently with the fact that law in the end must be made by Parliament and not by the High Court. To sum up on the question of severability or inseverability, the power of s. 46 to stand when the rest of the Act has fallen may be presented as a dilemma, for if, as a matter of construction a court feels that it is bound to interpret sub-ss. 4 to 8 of s. 46 as containing a separate and independent power, then it is submitted that they must be avoided because they would bring about unjust terms of acquisition. It is an accepted principle of construction that a court will endeavour to construe a statute so that it does not deprive persons of property without compensation : *Attorney-General* v. *De Keyser's Royal Hotel* (1). Every effort should be made, if it is legitimately open, to ensure that on the construction of this Act it was not intended that there should be an independent power in the Treasurer to stop the businesses of these banks without paying a penny of compensation. The only solution, it is submitted, is to harmonise sub-s. 1 and sub-s. 4 and make them one prohibition, and not two separate ones, and then it is fairly plain that sub-s. 1 is directed to the acquisition which the Act was intended to achieve.

Turning to the question whether s. 46, assuming it to be a separate and independent power, is within the legislative power of the Commonwealth, the first point is whether it is an Act about banking or about persons. Section 51 (xiii) of the Constitution gives a power to make laws with respect to what bankers do, or are to do, qua bankers. Banking is not the banking system or the banking community or anything like

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(1) [1920] A. C. 508, 542.

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that; it is quite strictly the activities of bankers: *Tenant* v. *Union Bank of Canada* (1); *Attorney-General for Canada* v. *Attorney-General for the Province of Quebec and Others* (2); *In re Three Bills Passed by the Legislature of Alberta* (3); *Attorney-General for Alberta* v. *Attorney-General for Canada* (4) and *United States* v. *Darby* (5). The meaning of "banking" in this constitution stands where it did after *Tenant* v. *Union Bank of Canada* (1). A power to legislate in respect of banking is a power to legislate in respect of an activity—what bankers do qua bankers.

On the question of the prohibition of persons from engaging in a trade reference may be made to *Huddart Parker's* case (6), the *Airways* case (7) and the *Melbourne Corporation* case (8). In the last-cited case the nature of the section there in question was not something that declared that certain banks should not carry on the business of banking; it was one which said that while they did they were not, without special authority, to have as their customers the States or municipal authorities. Therefore it might fairly be said that it was, strictly speaking, a regulation as to how those bankers were to carry on their business of banking. That case was not a decision on my point, which is that there is no constitutional power to say to somebody by name and no more: "You shall not bank." Section 46 is a bare power, and in reality and in substance it is an Act about the persons and not about the activity. It is simply a legislative direction to those individuals that they are not to do what hitherto they have been doing. If the power to prohibit is not given to the Minister subject to some conditions, then he is entitled to exercise it as irrelevantly or as irresponsibly as he may choose. It means that there is a power which might be exercised for any reason having no connexion with the activity of banking and yet be a good exercise of the power as given. That, it is submitted, is something which, since the Commonwealth power can be derived only from a power to legislate with respect to the activity of banking, cannot be achieved under the Constitution. We turn now to the argument for the respondent banks on s. 92.

G. E. Barwick K.C. There is no question that the banks have inter-State banking transactions, and s. 46 of the Banking

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(1) [1894] A. C. 31, 44.
(2) [1947] A. C. 33, 41, 43.
(3) (1938) S. C. R. (Can.) 100.
(4) [1939] A. C. 117, 133.
(5) (1941) 312 U. S. 100, 113.
(6) 44 C. L. R. 492.
(7) 71 C. L. R. 29.
(8) 74 C. L. R. 31.

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Act operates, first, in the narrow view, to prevent inter-State banking transactions ; secondly, it operates to exclude from the activity of inter-State banking all who are now engaged in it—it does so to create a monopoly in the Government bank ; thirdly, the operation of the section is to subject an indispensable step in the movement of goods in trade to the arbitrary control of the executive. What is in question here is direct and absolute prohibition, and the problem which the section presents may be stated in three parts. First, is the exclusion of all individuals from an activity of inter-State trade, commerce and intercourse compatible with the absolute freedom of inter-State trade, commerce and intercourse. Secondly, is the exclusion of an individual carrying on an inter-State activity of trade, commerce or intercourse for no reason touching himself or the manner of his carrying on that activity compatible with the freedom. The third problem is, is the subjection of a step which is essential to the sale of goods inter-State to the arbitrary control of the Executive Government compatible with that freedom. As to the first two problems, the question arises whether s. 92 protects persons. The respondents have not said at any stage, and do not now say, that s. 92 gives to the individual an immunity from all law. What the respondents have said is that the exclusion of persons from participating in trade infringes s. 92 unless in exceptional cases their exclusion proves to be no more than a regulation of the activity. Broadcasting is an illustration. If everybody started to blow a trumpet in the air nobody would be heard. In that event the limitation of the number of persons who could use the air would, the respondents concede, be good. That would be regulating the use of the air, not burdening anybody as a burden but as a regulation, it is preserving the freedom.

The most difficult problem of all in connexion with s. 92, namely, the precise point at which regulation moves into burden, does not arise in this case. This is a case of outright prohibition. No problems arise with respect to acquisition ; it is true that there were acquisition provisions associated with this Act, but that is not now connected with s. 46. Nor are there any difficulties about war, pestilence or famine in this case ; nobody suggests that the occupation of the respondents is deleterious or that the way they carry on is bad. This prohibition cannot very well be said to be a regulation of anything.

Our first submission is that the effect of the decisions of the Board in *James* v. *Cowan* (1) and *James* v. *The Commonwealth* (2) is specifically to decide, first, that a law authorizing executive control of where and in what quantities persons may market their goods is inconsistent with s. 92 in cases where there is an inter-State market. Secondly, we say that those decisions decide that a law which prohibits persons, except upon licence, from carrying goods inter-State is invalid. That is the precise decision in *James* v. *The Commonwealth* (2). It is very difficult to say that that case lends any support to the view that one can choose actors ; it denies it in terms, and it denies that you can licence persons in the inter-State carriage of goods. Thirdly, those cases specifically decide that the generality of a law, such as a law authorizing where and in what quantities persons may market their goods, will not save it if it operates on the inter-State activity. Fourthly, and this is in one sense the obverse of the third, that the absence of discrimination against the inter-State activity will not save the law. Those propositions are not argumentatively drawn from *James* v. *Cowan* (1) and *James* v. *The Commonwealth* (2), they are the precise things that were decided. As propositions derived argumentatively, it is submitted that *James* v. *The Commonwealth* (2) decided firstly that the absolute freedom of which s. 92 speaks is not freedom from all laws which affect activities of trade, commerce and intercourse among the States, but is freedom from such laws as substantially burden, restrict or prevent such activities as at the borders in this sense, in respect of the interchange or movement from State to State. In the words " burden, " restrict or prevent " there is wrapped up the antithesis of the word " regulate " as I have used it. Next, *James* v. *The Commonwealth* (1) did not apply that freedom as so conceived to anything less than the whole of the trade, commerce and intercourse. That case reduced the freedom from freedom from all laws to freedom from only certain laws, and in defining those certain laws it corrected the main aspect of *McArthur's* case (3) ; it said that those laws were laws which had to bear on the movement as at the border. One must first find that its operation is a burden—gone beyond regulation to burden ; and secondly, it must be a burden as on the movement, the interchange, from State to State. That is

(1) [1932] A. C. 542.
(2) [1936] A. C. 578.
(3) 28 C. L. R. 530.

a question of fact, and when one approaches the borderline between regulation and burden minds will differ: *Home Benefits Pty., Ld.* v. *Crafter* (1); *The King* v. *Connare; Ex parte Wawn* (2) and *The King* v. *Martin; Ex parte Wawn* (3). It is also submitted that a law which creates a monopoly in an activity of inter-State trade offends against s. 92.

The banker who is carrying on business to move money from one place to another, amongst other things, is in inter-State trade. We do not say that in no circumstances may a person be excluded from participation in an inter-State activity of trade, commerce and intercourse; how can it be said that it is an impairment of the freedom of trade to require a man not to trade while he is bankrupt? Nor do we say that there can be no choosing of actors in any circumstances; there may be a licensing scheme with an auxiliary prohibition of unlicensed persons, and in that sense, of course, actors can be chosen. There are numerous things which can be suggested as merely regulating and securing that trade was free. That has no resemblance to the present type of law. To subject an activity to arbitrary executive control is to burden it. In short, a man is not free who trades merely at the discretion of an official. That is not freedom, and if that is what the law does it is bad. Lastly, it is for the court to determine whether the law does burden as distinct from regulate, decided as a question of fact. [The constitutional position of s. 92 and of the court in relation to it was then discussed.] This Constitution is federal in the true sense: *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co., Ld.* (4), and the fundamental consideration is the adoption of the American model. The only relevant American decisions are those which decide what is the subject-matter of commerce, and it has been held that it includes all forms of commercial intercourse. In particular, it includes transportation as a business, and dealings with such intangibles as information—as, e.g., the circulation of information by the telegraph. It was also decided that monopoly in the individual was a breach of the freedom of commerce: *Gibbons* v. *Ogden* (5), which is the foundation of all the American cases on what is commerce. The point is, that with that in mind, s. 92 was cast as it is. It would be an extremely odd thing, with that

(1) (1939) 61 C. L. R. 701.
(2) (1939) 61 C. L. R. 596.
(3) (1939) 62 C. L. R. 457.
(4) [1914] A. C. 237.
(5) (1824) 9 Wheat. 1.

background, to say, as do the appellants and as is fundamental to their case, that s. 92 only protects the passage of goods.

Whether a law infringes s. 92 cannot be tested merely by asking what the law is about. That is what *McArthur's* case (1) did in substance, and it caused the complications of the intervening years. This is a prohibition, and it does not matter what the law is about if it operates in the area. The test is the operation of the law, not what it is about. *James* v. *South Australia* (2) and *James* v. *Cowan* (3) support the contention that the latter case decided that s. 92 does protect individuals, that there is no need for discrimination, and that the motive or purpose or policy of the law cannot be called in aid to validate it. Section 20 of the Act in question in *James* v. *South Australia* (2) was held to be invalid, and it authorized the Dried Fruits Board to tell people where and in what quantities they should market their fruit, and for that reason alone it was invalid. That decision was confirmed in the most emphatic language in *James* v. *Cowan* (3). On the assumption that the banker is in trade, *James* v. *Cowan* (3) precisely covers this case. That which brought s. 20 down was nothing more than its mere operation. *James* v. *Cowan* (3) lends no colour whatever to an argument that an Act to offend against s. 92 must spring from some motive or policy inimical to or hostile to trade. In *James* v. *The Commonwealth* (4) language is used which can only be explained by the Board not accepting the idea that the law must be directed against, in the sense of having some policy or motive to harm trade.

It is submitted, next, that the *Milk Board* case (5) was wrongly decided. What the Chief Justice was saying in that case was that, although the Act operates to prevent inter-State trade, it is still good unless you can find some policy or motive hostile to, or inimical to, inter-State trade. That is, of course, the thesis of the appellants in the present case. The Chief Justice was saying that if the expropriation is made with a good motive the law is good, but if with a bad motive it would be bad. That, it is submitted, is flying right in the face of *James* v. *South Australia* (2) and *James* v. *Cowan* (3). Evatt J. in the *Milk Board* case (5) said that there is a sufficient analogy between that case and *Gallagher* v. *Lynn* (6) to apply to the Milk Act the words of Lord Atkin : " The true nature and " character of the Act, its pith and substance, is that it is an " Act to protect the health of the inhabitants of Northern " Ireland ; and in those circumstances, though it may " incidentally affect trade with County Donegal, it is not " passed 'in respect of' trade, and is therefore not subject " to attack on that ground " (1). The House of Lords, however, were there dealing with a different problem, and so fundamentally different as to make *Gallagher* v. *Lynn* (2) inappropriate. The idea of pith and substance or subject-matter has no place in my argument on s. 92. The *Milk Board* case (3) is indistinguishable from the *Peanut Board* case (4), which is correct on the precise reasoning in *James* v. *South Australia* (5) and *James* v. *Cowan* (6). The next case on which the appellants relied, *Andrews* v. *Howell* (7), is a somewhat similar case in which there was a compulsory marketing scheme in respect of apples and pears, passed under wartime national security powers ; it does not appear to advance the matter beyond the *Milk Board* case (3).

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(1) 28 C. L. R. 530.
(2) (1927) 40 C. L. R. 1.
(3) [1932] A. C. 542.
(4) [1936] A. C. 587.
(5) 62 C. L. R. 116.
(6) [1937] A. C. 863.

To take stock, if I have established that there is an individual protection it would follow that the appellants' argument that they can in every case choose actors must fail. Secondly, the only meaning which can be given to the words " directed against " is if they operate upon. It was suggested that *Huddart Parker's* case (8) supports the view that actors can be chosen. In the first place, however, the workers in that case were not themselves traders ; secondly, it was not a case of the arbitrary exclusion of the worker in any case. That case is the mainspring of the appellants' argument that you can choose actors, and I answer it on the one hand by the positive decisions of the Board in *James* v. *South Australia* (5), *James* v. *Cowan* (6), and *James* v. *The Commonwealth* (9), and on the other hand I submit that as a basis for the argument it will not bear the weight of it. The other line of cases on which this choosing of actors was sought to be supported was the transport cases. Only *Vizzard's* case (10) need be mentioned. The appellants say that that decision was one that a State could subject the inter-State carrier to an arbitrary licensing system, and claim that in that sense it was approved by this Board. My first short answer to that is that *James* v. *The Commonwealth* (1) in its actual decision denied the very proposition, because it decided that you cannot subject the inter-State carrier to an arbitrary licensing system. Further, the Act in question there was defined as a traffic co-ordination measure not being a law of trade. [Reference was also made to *Duncan and Green Star Trading Co., Pty., Ld.* v. *Vizzard* (2).] To say that you can limit the position of an owner of goods as to where he will sell his commodity, in the sense of what market he can go to and the place he can occupy, and which road his carrier is to take, or how fast his vehicle shall go, or whether it is to have good or bad brakes and that sort of thing, does not mean that you can therefore stop him going at all. In the transport cases co-ordination is one thing, but when under the guise of co-ordination you simply exclude from competition, that is quite a different idea, and that is the twist which the cases take as they develop. *Vizzard's* case (3) contains nothing by way of reasoning which advances the appellant's case here. *Duncan's* case (2) and the *Riverina Transport Pty.* case (4) are not logical extensions, as it were, of the reasoning in *Vizzard's* case (3). They have introduced a new element which I would not concede, namely, that instead of co-ordinating you can rationalize, i.e., you can say that it is better for people not to run their own affairs. We do not concede that that step could be taken on the basis of *Vizzard's* case (3).

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(1) [1937] A. C. 863, 870.
(2) Ibid. 863.
(3) 62 C. L. R. 116.
(4) 48 C. L. R. 266.
(5) 40 C. L. R. 1.
(6) [1932] A. C. 542.
(7) 65 C. L. R. 255.
(8) 44 C. L. R. 492.
(9) [1936] A. C. 578.
(10) 50 C. L. R. 30.

With regard to the proposition that was advanced, namely, that to substitute one person to carry on a branch of trade and exclude all others from participation in it leaves trade, commerce and intercourse absolutely free, that is sometimes described as canalizing it, in the sense of putting it all into one stream. Both in England, in America and in Australia there have been decisions that monopoly breaches freedom of trade: *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co., Ld.* (5); *Gibbons* v. *Ogden* (6); *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (7). To substitute one banker for all the others might be to say that the trade shall be carried on, but that is not what the section says. It shall be free, and that can only mean that people are free to engage in it. Arbitrarily to prohibit a person from participation in trade is bad. On the other side, assuming that a banker is not in trade, arbitrarily to subject him to the will of the Government is bad. In this connexion it is submitted that s. 11 of the Banking Act is unenforceable; it is without any sanction whatever. It purports to set some standard for the Commonwealth Bank, but a standard which the individual cannot enforce or insist on. Secondly, the language in which s. 11 is cast does not secure the actual provision of inter-State facilities for banking. There is nothing in the section which ensures that the trade of a trader in goods is not subject to the arbitrary will of the Treasurer and that the banking facilities will not be used as an instrument of Government policy at any particular time.

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(1) [1936] A. C. 578.
(2) 53 C. L. R. 493.
(3) 50 C. L. R. 30.
(4) 57 C. L. R. 327.
(5) [1913] A. C. 781.
(6) 9 Wheat. 1.
(7) (1878) 96 U. S. 1.

To turn now to the direct way of dealing with the matter, namely, the submission that a banker in Australia does engage in inter-State trade, commerce or intercourse, i.e., that banking is trade. If that is correct, this case can be directly and simply resolved, because if s. 92 protects individuals, and if s. 46 is a law which merely excludes the banker from participation in his banking business, and if one has not got to find some malevolent motive in the legislature, and a banker is in trade, then the case for the respondents is complete in a very short and direct way. It is the *Airways* case (1) again in a simpler form. In that case the air line operator is found to be in trade and you merely exclude him, and the High Court unanimously held that that could not be done. That case was clearly right. The concept of trade is a practical one, and has been held in Australia and in America to include intangibles as well as tangibles. In essence, at least one of a banker's principal functions is the movement of money from place to place. Whether he sends a letter to his agent or branch, or rings up, equally he has indulged in commercial intercourse with his own branch, and to say that he shall not have that inter-State banking transaction is essentially to prevent at least his intercourse across the State line, whether one is tied to the notion of something moving or not. The Board in *Trinidad Lake Asphalt Operating Co., Ld.* v. *Commissioners of Income Tax for Trinidad and Tobago* (2) appeared

(1) 71 C. L. R. 29.

(2) [1945] A. C. 1.

to think that something moved—that there was a transmission. [Reference was also made to *Freeman* v. *Hewit* (1).] To sum up, a banker is in trade; in any case, his transactions are inter-State intercourse, and it is that which is forbidden by s. 46 of the Banking Act.

If one had to approach s. 92 freed of authority the line may be difficult to draw precisely from time to time, but none the less there is an idea of freedom in an ordered society which pre-supposes some regulations—because all law is in some sense restrictive—but which would still leave a man free in respect of the particular activity. Though not so expressly stated, that is what was decided in *James* v. *The Commonwealth* (2), and Barton J. in *Duncan* v. *State of Queensland* (3) said "when we speak of our freedom, we speak of an 'ordered "'liberty.'" The problem presented to the Board in *James* v. *The Commonwealth* (2) was really not one which is germane to the present case, because before that case came to be decided the Board had determined those elements which are decisive of this case, at least on the basis that a banker is a trader, for *James* v. *South Australia* (4), as approved in *James* v. *Cowan* (5), and the latter case as applied in the *Peanut Board* case (6), had decided that you could not exclude individuals from participation in inter-State trade, that motive did not matter, that discrimination was not necessary, and that you would look to the operation of the law to see what it was doing. Little pieces have been lifted out of the judgment in *James* v. *The Commonwealth* (2) and have become shibboleths, texts, and away from the surrounding context they have had applied to them all sorts of refinements that were never intended by the author of the judgment. What Lord Wright meant, it is submitted, is that freedom is a concept which has some limitations on it. It is not a philosophical or metaphysical concept, but a practical one. Having examined the authorities Lord Wright says that "free" has to take its meaning from its context. It means freedom governed by law, and he says that you cannot limit it to freedom from tariffs. "But if "freedom is to be found in practice," he said, "the line must "be drawn somewhere." Then comes the passage around which a great deal of discussion has taken place in the Australian cases: "The true criterion seems to be that what is meant

(1) (1946) 329 U. S. 249.
(2) [1936] A. C. 578.
(3) 22 C. L. R. 556.
(4) 40 C. L. R. 1.
(5) [1932] A. C. 542.
(6) 48 C. L. R. 266.

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"is freedom as at the frontier or, to use the words of "s. 112, in respect of 'goods passing into or out of the "'State.'" That would mean, it is submitted, it would be free from laws which do more than regulate and which burden the movement. This expression "as at the frontier" has become a classical expression in the subsequent cases, largely, perhaps, because of a tendency not to look deeper than the words to what the basic idea or principle was which was being sought to be conveyed and, further, very often because the judgment was not read in the light of the problem which it was setting out to answer. What the Board decided was that s. 92 provided for freedom of the activity of trade, commerce and intercourse from all those laws which in their operation did more than regulate in the sense I have indicated.

The *Airways* case (1) was rightly decided and properly applies the decisions of this Board. The whole court in that case held that in its relation to inter-State air transport reg. 79 (3.) contravened s. 92 because it prevented persons from taking part in inter-State trade and commerce, excepting only those to whom a Commonwealth official in the exercise of an uncontrolled discretion might choose to issue a licence. The licensing scheme had thus ceased to be a mere regulation of inter-State trade, and it was bad. In the present case a banker is in business, he is engaged in inter-State trade and commerce, and to forbid him carrying on that business is to infringe s. 92. It is submitted that in this case the Chief Justice, if he had held that a banker was engaged in inter-State trade, would have found for the respondents and have joined the other judges, and it follows that McTiernan J. would have done likewise; there would then have been a unanimous judgment. The case can really be disposed of on a narrow basis like the *Airways* case (1).

Sir David Maxwell Fyfe K.C., and *Douglas I. Menzies* (Australian Bar) for the State of Victoria. On the preliminary point under s. 74 we first of all support the construction of the section submitted by Sir Cyril Radcliffe. Secondly, if the Board come to the conclusion that the words "upon any "question, howsoever arising," qualify "decision of the "High Court," then it is submitted that the declaration that s. 46 is invalid is itself a decision on an inter se question. We say that the existence of s. 46 raises a conflict between the legislative power of the Commonwealth and the executive power of the States and delimits that executive power. Thirdly, and as a further alternative point, if, contrary to the respondents' submission, a construction of s. 74 should be adopted which gives to the word " decision " the meaning of the ratio decidendi or the declaration of the law as affirmed by the court on which the actual judgment or order was based, and treats the words " upon any question, howsoever " arising " as qualifying the expression " decision of the " High Court," the respondents then submit that the declaration of the High Court that s. 46 is invalid has for its ratio decidendi or the declaration of the law as affirmed by the court, at least in part, the decision in this sense of an inter se question. Fourthly, if an attempt is made to give to " decision " the meaning of ratio decidendi or the declaration of the law as affirmed by the court, unless the reasoning of all the judges who are party to the decision is included, then the uncertainties or possible anomalies are so great that the attempt to give this meaning fails. I adopt the definition of " limits inter se " given by Dixon J. in *Ex parte Nelson* (*No.* 2) (1) : " The expression ' limits inter se ' refers to some " mutual relation between the powers belonging to the " respective Governments of the Federal system."

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(1) 71 C. L. R. 29.

The State's claim on the main point, as opposed to the preliminary point, is that it is beyond the legislative power of the Commonwealth to prevent the State from continuing to use private banks and to force it either to bank with itself, which is really not having a bank at all, if the bank is a State bank, or to bank with the Commonwealth, who can control it. Our case is put in two ways, first, that s. 46 is contrary to an implied constitutional limitation, and secondly, that it is contrary to an express constitutional limitation of Commonwealth legislative power, namely, s. 92. It is conceded that the first point, the implied constitutional limitation, is an inter se point. It cannot be correct that an implied limitation would ex concessis raise an inter se point and the question of an express limitation would not : *Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (2). When the invalidation of an Act by s. 92 sets the State executive power free from a limitation to which it would otherwise be subject, then the decision on s. 92 is a decision on an inter se point. Therefore, the whole of this appeal is excluded by s. 74. [On the point that a conflict between

(1) (1929) 42 C. L. R. 258, 270. (2) [1909] A. C. 345.

Commonwealth legislative power and State executive power is an inter se question reference was made to *Baxter's* case (1) and *Pirrie* v. *McFarlane* (2).] In *James* v. *Cowan* (3), which was dealing with a State Act, the point that the Act would interfere with the executive powers of the Commonwealth was not taken ; it would have been an analogous case. This point was not raised in *James* v. *The Commonwealth* (4). The power to manage and control its public moneys, including the power to deal with private banks, is a power essential to the efficient working cf the business of government. Such a power in a State is part of the executive power: *Melbourne Corporation* v. *The Commonwealth* (5). The effect of s. 46 is that the Treasurer may stop a State doing banking business with a private bank. Victoria banks with private banks, and its Ministers and officers would, therefore, be guilty of an offence in withdrawing the public revenue of the State from the public account in a private bank to which a notice had been given under s. 46. In addition, s. 46 would override the provisions of the Audit Act of Victoria and the appointments made by the Governor in Council thereunder. If private banking were to be prohibited the States would have to bank with the Commonwealth Bank, which has been held to be a corporate agency of the Commonwealth. Therefore it follows that to prohibit private banking would in practice compel the States to bank with an agency of the Commonwealth, and the finances of the States would, therefore, be subject to control by the Commonwealth or an agency of the Commonwealth. If, therefore, the appeal goes the extent of determining the validity or invalidity of s. 46, it is an appeal from the decision of the High Court on an inter se question, and that is so whatever the ground on which the High Court declares it invalid.

On our main point, that s. 46 is beyond the powers of the Commonwealth Parliament because it is inconsistent with the maintenance of the constitutional integrity of the States—the first proposition is that it is beyond the power of the Commonwealth Parliament to enact legislation which might, or could, be used to deprive the States of their position as self-governing bodies politic and to make them in any sense dependencies of the Commonwealth. Secondly, which is really a particularization, it is beyond the power of Parliament to enact legislation which would, or could, be used to control the States. Thirdly, the State would not be autonomous and would be subordinate to the Commonwealth if its arrangements for the collection, management and custody of public moneys were to be subjected to the control of the Commonwealth. That simply relates to the banking power. The above propositions are supported by the Australian authorities: *D'Emden* v. *Pedder* (1); *Deakin* v. *Webb* (2); *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (3); *Webb* v. *Outrim* (4); *Baxter's* case (5); *The King* v. *Sutton* (6); *Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (7); *The King* v. *Barger* (8); *Chaplin* v. *Commissioner of Taxes for South Australia* (9) and; *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (10). In the above group of cases the rule in *D'Emden* v. *Pedder* (1) was accepted, and the decision too, that is, not only the principle that there could not be an interference with the function of the State, but that the smallest interference constituted an infringement of the rule. That view subsisted until the attack on the rule began with the *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ld.* (11). It is submitted, however, that the last cited case did not dispose of the doctrine of implication in the Constitution; there has been a whittling down of that case in the course of judicial history since 1920. The cases which followed the *Engineers'* case (11) were *The Commonwealth* v. *State of Queensland* (12); *Pirrie* v. *McFarlane* (13); *Federated State School Teachers' Association of Australia* v. *State of Victoria* (14); *West* v. *Commissioner of Taxation* (*N.S.W.*) (15). The next case in this line is *South Australia* v. *The Commonwealth* (16), which is of great difficulty and importance. Broadly, the States contended that the purpose, effect and operation of the Acts there in question were to make the Commonwealth the exclusive taxing authority, and to prevent the States from

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(1) 4 C. L. R. 1087, 1118–9.

(2) (1925) 36 C. L. R. 170, 194.

(3) [1932] A. C. 542.

(4) [1936] A. C. 578.

(5) (1947) 74 C. L. R. 31, 52, 67, 75–7.

(1) (1904) 1 C. L. R. 91.
(2) (1904) 1 C. L. R. 585.
(3) (1906) 4 C. L. R. 488.
(4) [1907] A. C. 81, 87.
(5) 4 C. L. R. 1087.
(6) (1908) 5 C. L. R. 789.
(7) (1908) 5 C. L. R. 818.
(8) (1908) 6 C. L. R. 41.
(9) (1911) 12 C. L. R. 375.
(10) (1919) 26 C. L. R. 508.
(11) (1920) 28 C. L. R. 129.
(12) (1920) 29 C. L. R. 1.
(13) 36 C. L. R. 170.
(14) (1929) 41 C. L. R. 569.
(15) (1937) 56 C. L. R. 657.
(16) (1942) 65 C. L. R. 373.

exercising their constitutional power to impose income tax. The Commonwealth contended that at a time of national emergency—and this was at the height of the war, after Pearl Harbour—the necessity for self-preservation made the defence power practically unlimited, and that in the circumstances the scheme should not be regarded as an attempt at destroying the States or their powers and functions. The court upheld the validity of all the four Acts in question, but there was some dissent. Broadly, it is submitted that the decision was wrong, at least as to the two Acts on which there was dissent. *The King* v. *Commonwealth Court of Conciliation and Arbitration ; Ex parte Victoria* (1) is substantially in our favour, as is *Pidoto* v. *State of Victoria* (2) ; see also *Essendon Corporation* v. *Criterion Theatres, Ld.* (3).

It is submitted on the above authorities that the existence of an implication at least as wide as that for which the respondents contend has always been recognized by the High Court of Australia, and it is submitted, with the addition of the *Melbourne Corporation* case (4), that we have established that proposition. Further, the judgments of the Privy Council in the following cases support the implication : *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ld.* (5) ; *James* v. *The Commonwealth* (6) ; and *W. R. Moran Proprietary, Ld.* v. *Deputy Commissioner of Taxation for New South Wales* (7). Decisions on the British North America Act support the existence of such an implication applicable to the Canadian federal system, although it is less truly federal than the Australian system : *Great West Saddlery Co.* v. *The King* (8) ; *Caron* v. *The King* (9) and *Attorney-General for Canada* v. *Attorney-General for Ontario* (10). [Reference was also made to the following American decisions on the general proposition that it is unconstitutional for the operations of a State to be interfered with by the National Government : *M'Culloch* v. *State of Maryland* (11) ; *Osborne* v. *United States Bank* (12) ; *State of South Carolina* v. *United States* (13) ; *Metcalf* v. *Mitchell* (14) ; *Panhandle Oil Co.* v. *State*

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(1) (1942) 66 C. L. R. 488.
(2) 68 C. L. R. 87.
(3) (1947) 74 C. L. R. 1.
(4) 74 C. L. R. 31.
(5) [1914] A. C. 237, 252, *et seq.*
(6) [1936] A. C. 578, 610–11.
(7) [1940] A. C. 838, 855–8.
(8) [1921] 2 A. C. 91, 100.
(9) [1924] A. C. 999, 1005–6.
(10) [1937] A. C. 326, 352–4.
(11) (1819) 4 Wheat. 316, 422–31.
(12) (1824) 9 Wheat. 738, 859–67.
(13) (1905) 199 U. S. 437, 453, 461.
(14) (1926) 269 U. S. 514, 521–23.

of Mississippi (1); *Indian Motorcycle Co.* v. *United States* (2); *Board of Trustees of the University of Illinois* v. *United States* (3); *James* v. *Dravo Contracting Co.* (4); *Helvering* v. *Mountain Producers Corporation* (5); *Helvering* v. *Gerhardt* (6); *Graves* v. *New York* (7); *United States* v. *County of Allegheny* (8); and *New York* v. *United States* (9). In the last cited case the Chief Justice said that "a federal tax which "is not discriminatory as to the subject-matter may never- "theless so affect the State merely because it is a State that is "being taxed, as to interfere unduly with the State's per- "formance of its sovereign functions of government." That is practically the proposition for which we are arguing here almost ipsissima verba. It follows that the executive powers of the States are in fact affected by the legislation now in question to an extent which would prevent them properly functioning as independent Governments in a federal constitution: the *Melbourne Corporation* case (10), which is really the keynote of my argument, and the decision in that case logically must mean that the present case should have been decided in my favour. If we are made to bank with the Commonwealth the Commonwealth Bank can dictate our financial policy. The Commonwealth Bank is an instrument of the Commonwealth. He who dictates our banking policy dictates our general policy, and we have ceased to function as a State.

A. J. Hannan K.C. (Australian Bar) and *J. Harcourt Barrington* for the States of South Australia and Western Australia. Section 46 is invalid for the reasons which have been submitted in argument by counsel for the respondents. I adopt the argument of Sir Cyril Radcliffe on invalidity on the ground of want of power under s. 51 (xiii), and his argument that s. 46 is invalid because it is not severable from the invalid parts of the Act—i.e., those already held invalid by the High Court. I also adopt the argument of Mr. Barwick that s. 46 is invalid inasmuch as it contains an absolute and complete

(1) (1928) 277 U. S. 218, 221–2.

(2) (1931) 283 U. S. 570, 575–6.

(3) (1933) 289 U. S. 48, 56–7, 59.

(4) (1937) 302 U. S. 134, 145–50, 157.

(5) (1938) 303 U. S. 376, 385, 387.

(6) (1938) 304 U. S. 405, 414–5, 421.

(7) (1939) 306 U. S. 466, 483–92.

(8) (1944) 322 U. S. 174, 186–8.

(9) (1946) 326 U. S. 572, 586.

(10) 74 C. L. R. 31.

prohibition of the particular type of inter-State trade and is therefore contrary to s. 92. I also adopt the argument of Sir David Maxwell Fyfe that s. 46 is invalid because it is contrary to the implied prohibition arising from the federal nature of the Constitution and because it interferes with an essential function of State Governments. I also adopt the preliminary argument of Sir Cyril Radcliffe that the appeal is incompetent for want of a certificate from the High Court under s. 74.

It is further submitted that s. 46 is also invalid because it is inconsistent with the right given to the States by cl. 5, sub-cl. 9, of the Financial Agreement, 1927, which, by virtue of s. 105A, sub-s. 5, of the Commonwealth Constitution, is binding on the Commonwealth notwithstanding anything to the contrary in the Commonwealth Constitution or in common law. The effect of sub-s. 5 is to make the Financial Agreement and all its terms a part of the Commonwealth Constitution and to give to the agreement and its terms the effect of a paramount binding source of rules of constitutional law, to that extent overriding the constitutional powers of the Commonwealth Parliament conferred by the Constitution Act and of the various State Parliaments acting under their own Constitution, and also it operates to restrain executive action of both Commonwealth and State Governments. The substance of sub-cl. 9 of cl. 5 of the agreement is that any State may borrow money on overdraft for temporary purposes, and it is submitted that that confers a right on every State to borrow money for temporary purposes by way of overdraft from a bank without any control except that which is mentioned in the sub-clause, namely, control by the Loan Council in fixing, if it pleases, maximum rates for interest, etc.

There are six steps in the argument. First, the material part of sub-cl. 9 means that each State has a legal right to borrow on overdraft from a bank for temporary purposes without being subject to the control of the Commonwealth. Secondly, this right imports a contractual obligation on the part of the Commonwealth, the party on which the burden of the right is imposed. Thirdly, that contractual obligation of the Commonwealth is a promise that the Commonwealth Parliament will refrain from passing certain legislative enactments in an exercise of its power under s. 51 (xiii) to make laws with respect to banking, that is, an Act preventing States from borrowing on overdraft or from borrowing uncontrolled.

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The fourth step is that included in the class of statutes which the Commonwealth is forbidden to enact is any Act the effect of which is to give the States no alternative but to borrow from the Commonwealth Bank if they wish to borrow on overdraft. The fifth point is that the passing of s. 46 of the Banking Act, 1947, is a breach of contract, for it is legislation which subjects the States in their borrowing on overdraft to the control of the Commonwealth by reason of ss. 8 and 9 of the Commonwealth Bank Act, for borrowing from the Commonwealth Bank means borrowing subject to Commonwealth control. The sixth submission is that accordingly s. 46 is invalid for it is legislation inconsistent with the Financial Agreement which the Commonwealth has contracted not to enact, and this legislation, by reason of s. 105A of the Constitution, is invalid. The Financial Agreement is unique inasmuch as the principles of contract governing contracts between private persons do not all apply. There is to be no assumption, in fact it is the other way, that when these parties contract they acquiesce in changes of the law brought about by the other party. The agreement was made specifically so that there should be no legislation on prohibited subjects. [Reference was made to *New South Wales* v. *The Commonwealth* (*No.* 1) (1) and the *Melbourne Corporation* case (2).] This is not an inter se point, that is to say, sub-cl. 9 of cl. 5 is like s. 92, it indicates a prohibited and forbidden field of legislation for both Commonwealth and States. If this argument succeeds, it must be for the same reason that the argument in *James* v. *Cowan* (3) succeeded, namely, that the particular legislation was passed in violation of the constitutional prohibition. Sub-clause 9 is to be read into the Constitution and there it becomes a prohibition addressed to the Commonwealth in the Commonwealth Constitution and to the States in the States' Constitutions that they are not to pass Acts of Parliament which destroy or restrict or curtail the States' power of borrowing uncontrolled. Section 46 of the Banking Act, 1947, is invalid.

Dr. Evatt K.C. in reply. First, with regard to the preliminary question, the word "upon" in s. 74 cannot be read as equivalent to "involving." The very purpose of s. 74 in the first and second paragraphs is to concentrate attention upon a question and a specific question, not only a question

(1) (1932) 46 C. L. R. 155, 177.

(2) 74 C. L. R. 31.

(3) [1932] A. C. 542.

of a particular category, namely, an inter se question, but the importance and seriousness of the question in the particular case coming within that general category. That question is isolated. There is no reason for refusing to give to the two paragraphs their natural meaning, especially in the light afforded by the third paragraph, that the prerogative is to remain unaffected except as provided in the section. If that is the view of the section there is no bar to the appeal in this case, and the views of the judges below show that, in fact, there was no decision of the High Court on any inter se question. If there is no decision of the High Court against the appellants on an inter se question, that is enough, and they do not come within the prohibition. Next, the argument that s. 92 as applied to s. 46 raises an inter se question rests on an analysis which is not sound. The Board has jurisdiction to hear this appeal.

The main point is whether s. 92 withdraws from the Commonwealth Parliament the power to prohibit the carrying on of banking in Australia by privately-owned corporations. *James* v. *The Commonwealth* (1) in principle decides the case. The logical consequence of the argument for the respondents is to create difficulties for Australian legislatures, Commonwealth and State alike, which cannot be overcome, and the principles of their arguments are in direct collision with *James* v. *The Commonwealth* (1). Their contentions really assert virtually an unlimited right of the individual to trade in inter-State trade, taking the area as being the whole area which is covered by trading inter-State. However destructive of trade a law may be, s. 92 is not infringed except by a restriction imposed in respect of the actual or prospective passage of goods or persons across the State frontier. It has nothing to do with anything else. It has an operative effect, no doubt, for the protection of the individuals, but we are concerned to say that it does not give specifically rights to individuals in the sense of the clauses in the United States Constitution. It results in individuals being able to challenge restrictions imposed by legislatures in respect of the border. The respondents referred to the question whether an enactment is to be regarded as a regulation or as a burden. Our view is that there is no distinction that can be worked out and applied between regulation, in the sense of accommodation, and burden.

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(1) [1936] A. C. 578.

With regard to the facts of the transport cases, there was not a restriction imposed in truth in respect of the crossing of the border, but a restriction and a burden undoubtedly imposed for other purposes. There could be no infringement of s. 92 in relation to any form of transport if what the Act did was to organize transport to the best economical advantage and in the most efficient way. On the respondents' argument that you look at the operative effect, the superficial impact of the law only, you empty the rule in *James* v. *The Commonwealth* (1) of the essential element of the necessity of specific and direct relationship to the passage of goods or persons across the State borders. No law which simply prohibits an individual from engaging in any type of business or trade can ever be regarded as imposing a restriction in respect of the passage of goods across the border ; it is of a different character. The crucial decision in some respects from the point of view of the Commonwealth is the *Airways* case (2), because on a certain footing it has a very close analogy to s. 46 of the Banking Act.

To sum up the argument for the appellants on the s. 92 issue, that section does not embody any conception of freedom of trade, or freedom of trading, or freedom to trade, or freedom of the trader in the sense that freedom of competition is to be unrestricted. What s. 92 guarantees is freedom from a specific kind of restraint. Substantially, what is guaranteed is that legislative or executive restrictions in respect of the passage of goods or persons across the State boundaries shall not be adopted either by the Commonwealth or the State. The freedom of trade which is denied for instance, by a law creating a State monopoly has no connexion with the specific freedom of passage or movement across the State frontiers. There is no distinction in principle between a law which directly prohibits one individual from trading either generally or in respect of inter-State trade and a law which prohibits all except one chosen instrument from trading. In no case can the law be correctly described as having been imposed " in " respect of " the passage of goods or persons across the State frontier. Even laws passed concerning export from or import into a State are not necessarily laws passed " in respect of " the passage of goods or persons across the frontier in the course of inter-State trade, commerce or intercourse. Examples are laws excluding from a State diseased cattle, impure foods, or persons suffering from infectious or contagious disease.

(1) [1936] A. C. 578.

(2) 71 C. L. R. 29.

The test of detrimental impact on an individual trader of any law challenged under s. 92 is quite irrelevant to that section, even though such impact includes interference with the trader's operations in inter-State trade and may effectually obstruct his liberty to trade inter-State. Discrimination against inter-State trade in the forbidden area is good, though not conclusive, evidence that the law is obnoxious to s. 92. There is no basis either in authority or in reason for any test of validity on the ground that the law operates to "burden" as opposed to "regulate." The line between burden and regulation changes with economic and social conditions, and cannot be ascertained by legal considerations. Laws acquiring commodities are valid unless it is affirmatively established by those attacking the law (because of s. 92) that the acquisition is, in truth, imposing a restriction "in respect of" the passage or movement of goods across the State frontier. The fallacy of regarding s. 92 as affording something in the nature of a guarantee to individuals of a right to trade inter-State led to an erroneous conclusion in the *Airways* case (1).

For the purposes of the argument the foregoing submissions have all assumed, without, of course, conceding, that banking as such is to be regarded as included in the trade, commerce or intercourse which is protected by s. 92. It is submitted, however, that banking is not to be so regarded, and that Latham C.J. and McTiernan J. in the present case were correct in holding that it is merely an instrument or concomitant of trade. The banking business cannot as a business be regarded as included in the concept of the movement of trade, commerce and intercourse referred to in s. 92. The only thing relating to banking which could be alleged to flow across the frontier is credit in a sense, but credit does not on a true analysis move at all. Banking transactions have no relation to a moving provision or a transit section such as s. 92, and a fortiori the business of banking as such is not covered by s. 92.

In conclusion, it is not possible, on the principles of *James* v. *The Commonwealth* (2), to say that s. 46 of the Banking Act is invalidated in any respect by s. 92. First, whether banking is or is not to be identified with trade, commerce or intercourse, s. 46 does not impose any restriction "in respect of" passage or movement into or out of any State. Secondly, the true nature, real object and substance of s. 46 is to terminate in an orderly way all banking for private profit, leaving only the

(1) 71 C. L. R. 29.

(2) [1936] A. C. 578.

Commonwealth Bank and the State banks as the exclusive instruments by which the business of banking in Australia is to be conducted. Thirdly, s. 46 is a general law, and there are no special circumstances from which it can be said that the law is " directed against " inter-State trade in the forbidden area, and any impact thereon is merely incidental. Fourthly, the only basis on which s. 46 could be deemed to infringe s. 92 is the contention of the respondents that the section guarantees a positive right to the individual to trade inter-State, and that contention is entirely erroneous. Fifthly, in any event, the prohibition, contained in sub-s. 1 of s. 46, of the carrying on of banking business by a private bank following upon the taking over by the Commonwealth Bank, by agreement, of the business of the private bank, is clearly not invalidated by s. 92. Lastly, banking is a concomitant, instrument or facility of trade (as well as of manufacture, public administration, etc.) and banking is not intercourse, though banks resort to intercourse, and the respondents, on whom the burden lies, have not shown that the operation of s. 46 will necessarily have even an incidental restrictive impact on inter-State trade within the forbidden area. The attack on s. 46 by reference to s. 92 therefore fails completely.

As to the severability of s. 46, notwithstanding the invalidation of the compulsory acquisition provisions the prohibition in s. 46, sub-ss. 4 to 8, considered on ordinary common law principles and without having to turn to s. 6 of the Act, is an independent provision capable of separate operation. Secondly, in any event the application of s. 15A of the Acts Interpretation Act, and still more clearly of s. 6 of the Banking Act itself, places the severability of sub-ss. 4 to 8 beyond question. The whole of s. 46 is valid.

Of the questions on which the appellants are not appealing, the first inter se question is whether s. 46 is validly enacted under the legislative power of the Commonwealth under s. 51 (xiii), and my short submission is that so long as the law is one related to the subject-matter set out in s. 51 the powers of the Commonwealth are exactly of the quality and character of the powers of the Parliament at Westminster. Section 46 deals with banking and nothing else. Secondly, with regard to the suggested doctrine of implied immunities of instrumentalities, there is no express rule in the Constitution to which the respondents can point ; it is mere implication. Given the law-making power, subject to express limitations in the subject-matter, the general principle of the Constitution is the undeviating rule that the Commonwealth and the States are each bound in respect of the laws passed by the other. Although this case is clearly distinguishable on the facts from the *Melbourne Corporation* case (1), if undue interference is the test, it cannot occur where the State is put in the same position as other persons in the community. There is no case of singling out, and in the *Melbourne Corporation* case (1) and in the present Act, there is no command addressed to the State. Thirdly, sub-cl. 9 of cl. 5 of the Financial Agreement is not to be regarded as an overriding constitutional command at all. All that cl. 5 does is to say: " You may borrow " temporarily by way of overdraft from such financial institu- " tions as you are able to deal with and with whom you are " able to make an arrangement." It is not the implication of the agreement that banks are to be kept in existence by Commonwealth law so that the respondent States may in future raise money temporarily from them. Giving the clause its fullest meaning, it means that the State may, and the Commonwealth may under the next clause, borrow from such institutions as are then in existence and are prepared to lend.

Sir Walter Monckton K.C. replied on the question of s. 74 of the Constitution. We say that the certificate is necessary where you get an appeal from a decree or order which involves an inter se question in this sense, that in order for the appellant to get the relief which he is claiming he must succeed on the inter se point. " Decision " on the submission of the appellants means an opinion on a question of law expressed by a majority of the judges who constituted the court. That is a view which one would not readily accept if there was an alternative which was reasonably capable of acceptance, and it is submitted that the primary and natural meaning of the word " decision " is " decree or order of the court," used in conjunction with the word " appeal." On our construction the sentence would read in this way: " From an order of the " High Court no appeal involving an inter se question shall be " permitted to the King in Council." The only way in which a fair meaning can be given to this section is by reading " upon " as equivalent to " involving," a case, indeed, in which the appellant cannot succeed unless he succeeds on this inter se question all the way.

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(1) 74 C. L. R. 31.

July 26. Lord Porter announced that their Lordships would humbly advise His Majesty that the appeals should be dismissed, and that they would give their reasons at a later date.

Oct. 26. The reasons of their Lordships for dismissing the appeals were delivered by Lord Porter: These consolidated appeals from orders of the High Court of Australia raise important and difficult questions as to the legislative power of the Commonwealth Government under the Australian Constitution and as to the limitations expressly or by implication imposed on it by that Constitution. The Act of which the validity is challenged is the Banking Act, 1947, hereafter called "the Act." Its provisions will be referred to later in detail, but its objects, as stated in s. 3, may be at once set out. They are as follows:—

> "(*a*) the expansion of the banking business of the "Commonwealth Bank as a publicly-owned bank conducted "in the interests of the people of Australia and not for "private profit;
>
> "(*b*) the taking over by the Commonwealth Bank of the "banking business in Australia of private banks and the "acquisition on just terms of property used in that business;
>
> "(*c*) the prohibition of the carrying on of banking business "in Australia by private banks."

The legislative power of the Commonwealth is defined in s. 51 of the Constitution, which is, so far as is relevant, as follows:

> "The Parliament shall, subject to this Constitution, "have power to make laws for the peace, order, and good "government of the Commonwealth with respect to:—
>
> > "(i) Trade and commerce with other countries, and "among the States:
> >
> > "(xiii) Banking, other than State banking; also State "banking extending beyond the limits of the State "concerned, the incorporation of banks, and the issue "of paper money;
> >
> > "(xx) Foreign corporations, and trading or financial "corporations formed within the limits of the Common"wealth."

Purporting to exercise the power thus vested in it the Commonwealth enacted the Act. It does not touch State banking even within the limits authorized by placitum (xiii). The expansion of the Commonwealth Bank and the suppression of private banks are its aim. By "private banks" is meant the bodies corporate whose names are set out in sch. I to the Act. They are the banks authorized to carry on the business of banking in Australia under the provisions of the Banking Act of 1945. They are fourteen in number, eight of them incorporated in Australia, three of them in England and three elsewhere.

Forthwith on the passing of the Act numerous actions were commenced in the High Court in which the plaintiffs claimed that the Act was invalid. It is unnecessary to state the parties to the several actions beyond saying that the plaintiffs included the eight private banks incorporated in Australia, the three private banks incorporated in England together with, in some cases, a director and representative shareholder, and, in addition, the States of Victoria, South Australia and Western Australia, while the defendants were the Commonwealth of Australia, the Right Hon. Joseph Benedict Chifley (the Treasurer of the Commonwealth), the Commonwealth Bank of Australia and Hugh Traill Armitage (the Governor of that Bank). The defendants are the appellants in the present consolidated appeals, while the plaintiffs in the several actions are the respondents. In addition, the States of New South Wales and Queensland have by leave of their Lordships intervened in the appeal in support of the appellants.

Their Lordships are directly concerned in these appeals with one section only of the Act, s. 46, the terms of which will be presently set out. But in the High Court not only s. 46, but numerous other provisions of the Act were successfully attacked, and in respect of their declared invalidity the appellants have brought no appeal. It will be convenient as an introduction to s. 46 to state briefly the provisions of the Act and to explain what remains of them after the judgment of the High Court. Section 3, stating the objects of the Act, has already been set out. Other relevant provisions were of the following character :—

> Section 6. A severability clause in terms at least as wide as, and possibly wider than, those to be found in s. 15A of the Acts Interpretation Act, 1901-1941.
>
> Section 11. A declaration that it shall be the duty of the Commonwealth Bank to provide adequate banking facilities for any State or person requiring them.
>
> Section 12. A power to acquire by agreement all or any of the shares in a private bank.

Section 13. Powers of compulsory acquisition of Australian shares in any of the private banks where the Treasurer is satisfied that the majority in number of the shares in that bank are Australian shares, and a consequent provision (s. 15) for the payment of fair compensation therefor.

Section 17. An enactment that where Australian shares are so acquired the existing directors shall cease to hold office, and

Section 18 et seq. Power to the Governor of the Commonwealth Bank to appoint other directors in their stead, and certain provisions incidental thereto.

Section 22. Power to the Treasurer to invite a private bank to make an agreement with the Commonwealth Bank for the taking over of the business of that private bank.

Section 24. Where no such agreement is arrived at by a specified date provision for a compulsory transfer of the business in Australia of that bank to the Commonwealth Bank with the consequent transfer of assets and for the payment of fair compensation.

Sections 25–45. The setting up of a Court of Claims to assess compensation, and a provision that the computation of its amount should be entrusted to the Court of Claims exclusively and should consequently be withdrawn from the jurisdiction of the High Court.

By orders made by the High Court in each action it was declared that the following provisions of the Act were invalid, namely, Division 2 of Part IV (which contained ss. 12 to 16 inclusive) except in so far as it related to the voluntary acquisition of shares and without prejudice as therein mentioned, and Division 3 of Part IV (which contained ss. 17 to 21 inclusive) and ss. 24, 25, 37 to 45 inclusive, 46, 59 and 60. As has been already stated, these orders have not been appealed, except in regard to s. 46. This section is contained in, and makes up the whole of, Part VII of the Act. It is entitled "Prohibition of the Carrying on of Banking Business by Private "Banks," and is as follows: [The terms of s. 46 were then stated in full.] It is the validity of this section, divorced from the other sections of the Act which have been declared invalid, that the appellants seek to maintain. In the High Court and before this Board its validity has been challenged on grounds, which, though not all of them will be discussed, it is convenient to set out. It is attacked on the grounds: (i) that its provisions do not constitute a law for the peace, order and good government of the Commonwealth with respect to any of the matters with respect to which the Commonwealth Parliament has by virtue of s. 51 of the Constitution or otherwise, power to make laws; (ii) that they contravene s. 92 of the Constitution; (iii) that they are inconsistent with the maintenance of the constitutional integrity of the States; (iv) that they are inconsistent with s. 105A of the Constitution and the Financial Agreement made thereunder; (v) that they are inseparable from other provisions of the Act which are themselves invalid.

The appellants, contending that on none of these grounds was the decision of the High Court adverse to them except that which was based on the contravention of s. 92, seek to obtain from the Board a contrary decision on this point, and, as will appear, their Lordships will express their opinion on it. But before doing so they must examine and deal with another question of far-reaching importance. Special leave to appeal against the several orders of the High Court of Australia was granted to the appellants on the footing that at the hearing of the appeals the right should be reserved to the respondents to raise the preliminary plea that such appeals did not lie without the certificate of the High Court. It is this plea, which was duly raised by the respondents, that must now be considered, no such certificate having been sought or given.

Chapter III of the Constitution, which is entitled "The "Judicature," consists of s. 71 to s. 80 inclusive, of which s. 73 defines the appellate, and s. 75 the original, jurisdiction of the High Court of Australia thereby established. Section 74, which for the present purpose is all important, is in the following terms: [His Lordship set out the section and continued:] The question for determination is whether by reason of the provisions of this section the right of His Majesty by virtue of His Royal Prerogative to grant to the appellants special leave to appeal was, in the circumstances to which their Lordships must now refer, abrogated unless the High Court certified in the manner required by the section. It will be convenient to refer to a question of the kind described in s. 74 as an "inter se question."

The relevant circumstances appear to be these:

(1) The formal orders of the High Court make no reference to any "inter se" question. Declarations of invalidity

are made and injunctions are granted, but on the face of the orders the necessity for a certificate under s. 74 is not apparent.

(2) The several cases were heard without pleadings on motion. It is therefore only from the evidence which was given on affidavit, the statements made at the Bar as to the argument and the contents of the judgments of the learned judges of the High Court that it can be ascertained what were the issues raised and debated.

(3) A consideration of these matters places it beyond doubt that the validity of the Act in general and of s. 46 in particular was, as has already been stated, challenged on (inter alia) the grounds (*a*) that its provisions were not a law for the peace, order and good government of the Commonwealth with respect to any of the matters with respect to which the Commonwealth Parliament had power by virtue of s. 51 of the Constitution or otherwise to make laws, (*b*) that they were inconsistent with the maintenance of the constitutional integrity of the States, and (*c*) that they were inconsistent with s. 105A of the Constitution and the Financial Agreement made thereunder. These grounds admittedly raise inter se questions.

(4) The determination of each of these inter se questions in favour of the appellants was a necessary condition of a successful defence of the impugned Act in the High Court, and it remains a necessary condition of obtaining the relief sought on the appeal to His Majesty in Council. If these inter se questions are so determined the question whether the Act, or any of its provisions, contravenes s. 92 of the Constitution must then be decided. But this question appears not to be an inter se question.

(5) A clear majority of the judges of the High Court were of opinion that s. 46 of the Act contravened s. 92 of the Constitution and was accordingly invalid. The present appeal is brought to challenge the correctness of this opinion. On the inter se questions (except that of inconsistency with the maintenance of the constitutional integrity of the States) there was a considerable diversity of opinion, and in regard to this there was some controversy before their Lordships whether, if indeed it became necessary to determine whether a " decision " had been given on any inter se question, a final opinion could be attributed to some members of the court.

It is to these circumstances that the provisions of s. 74 of the Constitution must be applied, and it is convenient to state summarily the rival submissions of the parties. By the respondents, who contend that in the absence of a certificate no appeal lies, it is urged that on its true construction the section means that no appeal to His Majesty is permissible without certificate, if the relief sought on the appeal cannot be granted without the determination of an inter se question. The appellants on the other hand, though they agree that it may be necessary to look beyond the terms of the formal order, contend that a certificate is not necessary unless there has been a specific decision adverse to an appellant on an inter se question, which he and he alone wishes to challenge, and that it is erroneous to contend that a certificate is required merely because an inter se question has been raised in the proceedings before the High Court and may have to be decided in the appeal to His Majesty in Council.

Before considering how far these conflicting views accord with the actual language of s. 74 their Lordships would briefly examine the section in a somewhat wider aspect. It is, in the first place, clear that in the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those inter se questions which were of such vital importance to Commonwealth and States alike. Reference may be made on this aspect of the matter to the judgment of Griffith C.J. and Barton and O'Connor JJ. in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (1). In its broad outlines s. 74 speaks for itself in this respect, and the policy which it embodied is emphasized in later Judiciary Acts: see s. 38A of the Judiciary Act, 1903–1934, which reproduces s. 2 of Act No. 8 of 1907. It would be a paradoxical result if, in the face of s. 74, the determination of inter se questions, which might be of transcendent importance, was left to this Board by the accident that the respondent, having won before the High Court on some other point, yet wished to rely also on a contention which raised an inter se point. To this matter their Lordships will return when they consider the practical aspect of their decision. It is sufficient here to say that this argument appears to weigh heavily against the submission of the appellants.

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(1) 4 C. L. R. 1087.

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In the second place, there appears to their Lordships to be no ground for suggesting that any new kind of jurisdiction is created by s. 74. It deals with the Royal Prerogative to grant special leave to appeal and imposes certain limitations on, or, in the language of the section, in some degree " impairs," that right. But the appeal by special leave is what it always has been, an appeal from an order or other judicial act which affects adversely the rights claimed by the appellant party. It is in the light of this consideration that the section must, if possible, be construed. To give effect to the appellants' submission would appear to involve the admission of an appeal not from a judicial act but from the pronouncement of an opinion on a question of law. The conclusion to which these broad considerations point is, in their Lordships' opinion, assisted by a closer examination of the section, though its language suggests that the difficulty which now arises had not been in the mind of its authors.

As its opening words show, the section deals with " appeals " to His Majesty in Council and, as already observed, an appeal is the formal proceeding by which an unsuccessful party seeks to have the formal order of a court set aside or varied in his favour by an appellate court. It is only from such an order that an appeal can be brought. In s. 74 the appeal is described as an appeal " from a decision of the High Court " and so far no difficulty arises. " Decision " is an apt compendious word to cover " judgments, decrees, orders, and sentences," an expression that occurs in s. 73. It was used in the comparable context of the Judicial Committee Acts of 1833 and 1844 as a generic term to cover " determination, sentence, " rule or order " and " order, sentence or decree." Further, though it is not necessarily a word of art, there is high authority for saying that even without such a context the " natural, " obvious, and prima facie meaning of the word ' decision ' " is decision of the suit by the court " : see *Rajah Tasadduq Rasul Khan* v. *Manik Chand* (1), where the question was whether in the Indian Civil Procedure Code " decision " meant the formal expression of an adjudication in a suit or the statement given by the judge of the grounds of a decree or order, and Lord Davey, delivering the opinion of this Board, used the words that have been cited above.

It is, however, on the words next following that the appellants primarily rely. The appeal which is not permitted

(1) (1902) L. R. 30 I. A. 35, 39.

is an appeal "from a decision of the High Court upon any "question, howsoever arising, as to the limits inter se, etc.," and it is said by the appellants that the words "upon any "question" are to be read with the immediately preceding word "decision" and that, so read, they qualify the meaning of that word so that it must be interpreted as the expression of an opinion by the court on a particular inter se question, with the result (as their Lordships understand the argument) that the only prohibited appeal is one in which the appellants seek to obtain a reversal of that expression of opinion in an appellate court. In support of this contention the appellants rely also on the repetition of the word "question" at the end of the first paragraph, and again in the second paragraph of the section. It appears to their Lordships to be of little significance whether the words "upon any question" are linked (as the appellants contend) with "decision" or (as the respondents contend) with "appeal." The former is the natural grammatical meaning and is to be preferred. Then, so runs the appellants' argument, the respondents' construction requires that the word "upon" should be read as equivalent to "involving," and this, they say, is an illegitimate straining of language. It may be conceded that the word "upon" is not the word most apt to the occasion. But, if the alternative construction involves (as it appears to involve) giving to both the words "appeal" and "decision" some other than their natural and primary meaning and further involves a grave departure from the policy which clearly inspires this part of the Constitution, it does not appear to their Lordships that the use of the word "upon" where "involving" would more aptly be used should deter them from adopting the respondents' construction. It is a somewhat elliptical but by no means an impossible use of language to speak of a decision upon a certain question when what is meant is a decision in a suit, which cannot be decided without the determination of that question, or, more shortly, a decision involving a certain question or involving the determination of a certain question.

Moreover, if the construction for which the respondents contend may be criticized as departing from the strict meaning of the word "upon", the construction put forward by the appellants cannot escape a similar criticism. It was urged that, if the phrase, "No appeal . . . . from a decision of the "High Court upon any question" is read as a whole, without pausing upon its several elements, its meaning is clear. But, so read, it has not, or at least has not clearly, the meaning attributed to it by the appellants unless it is amplified so as to read, "No appeal from an order of the High Court being "a decision adverse to the appellant upon a question" (or "in so far as it is a decision adverse to the appellants upon "a question"). For this paraphrase, which is not artistic nor itself free from ambiguity, there seems to be no justification. To their Lordships it appears preferable to adhere strictly to the proper meaning of "appeal" and of "decision" when it is used in relation to an appeal. If any other interpretation is adopted, the word "decision" is required to do double duty, meaning at the same time the order of the court and an expression of opinion by the court.

The appellants, as has already been said, rely on the further references in the section to "the question"; so also do the respondents, who contend that the phrase in the second paragraph "an appeal . . . . on the question" not only supports their view that the words "upon any question" are to be linked with "appeal" rather than with "decision," but also, since "appeal" can have only one meaning, emphasizes the contention that the "question" means the suit in which the question is raised. In their Lordships' opinion, however, little assistance is given by the repetition of the word: the meaning of the first paragraph of the section must be determined by its own language.

In the next place, their Lordships must consider what is the scope and meaning of the section if the respondents' submission is not accepted. They have not found it easy to ascertain, or to state precisely, what is at this stage of the argument the contention of the appellants. It is clear that no difficulty arises unless it is sought to bring an appeal in a suit in which two pleas are involved, the one a plea which challenges the validity of a statute on an inter se question, the other a plea which may be a challenge of its validity on some other ground, e.g., that it offends against s. 92 of the Constitution, or may turn purely on some question of fact. Further, it is clear that no difficulty arises if both pleas are decided against the same party. It could not in that case be contended (subject only to a qualification appearing later) that an appeal would lie without a certificate of the High Court. But the difficulty arises where there are two pleas of the kind described and either the inter se plea (as it may briefly be called) is decided one way and the other plea the other way, or, a decision on the other plea being sufficient to determine the rights of the parties, the High Court think it unnecessary to express any, or any final, opinion on the inter se plea. And, as the present appeal well illustrates, the situation is capable of numerous, and by no means fanciful, variations. Thus, in a case in which two or three or more pleas, amongst them an inter se plea, were raised, it might well not be possible to say that there had been in favour of one party or the other a decision, or even an expression of opinion, on the inter se plea, by a majority of the judges constituting the court ; yet in such a case it might be clear that the unsuccessful party who sought to appeal could not succeed on his appeal unless the appellate court decided the inter se plea in his favour. It appears to their Lordships that, as soon as it is conceded (as both sides concede) that s. 74 cannot be confined to simple cases of declaratory judgments where the validity or invalidity of the impugned statute and the reason therefor appear on the face of the order, the limitation of its scope, for which the appellants contend, ought not to be accepted. They have already stated that in their opinion the definition for which the respondents contend gives a legitimate meaning to its actual language and is consonant with its obvious purpose.

Their Lordships in coming to this conclusion perforce disagree with the views expressed by the majority of the court in *Baxter's* case (1) as to the meaning of the word "decision" in s. 74, preferring that expressed by Higgins J. They would, however, observe that in that case it was unnecessary for the court to consider a case such as the present appeal, in which different pleas have been decided in favour of different parties, and to pursue to its logical conclusion the construction of the section which they favoured. Nor, valuable and important though their observations were, were they necessary to the decision of the case. The appellants further relied on the opinion expressed in a book entitled "The Annotated Constitution of the Australian Common-" wealth" a work published in 1901 in the early days of the Constitution. It does not appear to their Lordships that, however learned and distinguished its authors, they can give authoritative weight to an opinion which was expressed before the construction of the section had been tested before the court.

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(1) 4 C. L. R. 1087.

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Before leaving this question their Lordships think it right to deal with a point that arises on the second paragraph of the section. It is there provided that, if the High Court grants a certificate, "thereupon an appeal shall lie to His Majesty "in Council on the question without further leave." If, as their Lordships hold, the certificate of the High Court is necessary whenever the appellant cannot obtain the relief that he claims without the determination of an inter se question, does it follow that, when such a certificate has been given, no further leave is required, even though other questions, which are not inter se questions, will have to be determined? In their Lordships' opinion it does. On this question no settled practice has been, or could be, established until the scope of s. 74 had been finally determined. It may now be stated that in every case in which the relief sought on the appeal cannot be granted without the determination of an inter se question, (*a*) no appeal will lie without the certificate of the High Court, and (*b*) when that certificate has been given no further leave from His Majesty in Council will be necessary. It was suggested that the prerogative right to grant leave to appeal might in this way be unduly restricted, for a litigant might raise an inter se question on some unsubstantial pretext in the hope that thus the way to an appeal to His Majesty in Council would be barred. But the possibility of abuse is no reason for departure from what appears to be the logical procedure, and it can be assumed that the High Court or this Board will deal with such action summarily.

Finally, mention should be made of one class of case which requires special treatment. If, for example, a party to a suit contends (1.) that the facts of his case do not bring him within the operation of a statute and (2.) that, even if they do, the statute is invalid on some inter se ground, and both pleas are decided against him, there appears to be no reason why he should not accept the decision of the High Court on the inter se question but present a petition to His Majesty in Council for special leave to appeal on the other question. In such a case, if leave were granted, the Board would, on the hearing of the appeal, have no concern with any inter se question, and in harmony with the formula already stated the appellant could obtain the relief he claimed without the determination by the Board of any such question. The example given is not exhaustive of this class of case. The plea other than the inter se plea might be founded not on fact but on some other ground of invalidity, in which case the same principle would apply.

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The view which their Lordships have expressed that no appeal lies to them without a certificate from the High Court of Australia is conclusive of the case, and in normal circumstances they would not give any opinion on the many other matters argued before them. Nor do they propose to express any opinion on the "inter se" questions which it is the function of the High Court finally to determine unless a certificate is given under s. 74. But for two reasons they think it right to state their views on the question to which so large a part of the argument of the appellants was directed, namely, whether s. 46 of the Act offends against s. 92 of the Constitution; first, because it might yet be possible to apply for, and if the High Court should think fit to grant it, to obtain a certificate which would enable the appellants to re-argue a case already fully argued, and, secondly, because it appears to them that a large part of the appellants' argument was based on a misapprehension of two cases already decided by this Board which it is their Lordships' duty, so far as they can, to correct.

The familiar terms of the first part of s. 92 may be set out:

> "On the imposition of uniform duties of customs, trade, "commerce, and intercourse among the States, whether "by means of internal carriage or ocean navigation, shall "be absolutely free."

Forty years of controversy on these words have left one thing at least clear. It is no longer arguable that freedom from customs or other monetary charges alone is secured by the section. On that the contending parties, while differing on almost every other point, are agreed. The questions remaining are, what is included, and in particular, is the business of banking included, in the expression trade, commerce and intercourse? What is the freedom guaranteed by the section, and is it infringed by the Act?

On these questions the parties put forward conflicting contentions. The appellants (who claim support in the dissenting judgments of the Chief Justice and McTiernan J.) contend that banking, though it may be carried on by means of inter-State transactions, is not "trade, commerce and "intercourse among the States" within s. 92 and, further, that, even if it is, the Act does not infringe any guaranteed freedom. The contrary on both points is contended by the respondents, whose contention was upheld by the other four judges of the High Court. In considering these rival contentions, their Lordships will examine the decisions in the *James* cases, claimed by both sides to be decisive in their favour, and then consider the bearing of those decisions and the reasoning which appears to be implicit in them on the present case. But before this is done it remains to complete the statement of relevant facts and to deal with one matter, not indeed of general importance but peculiar to the present case, namely, the question whether s. 46 as a whole is severable from the parts of the Act which have been declared invalid, and the further question whether, if part of s. 46 itself is invalid, yet the rest of it is valid.

As may be surmised from what has already been said, the business of banking in Australia is at the present time carried on by three kinds of organization: (1.) the Commonwealth Bank of Australia, (2.) State Banks, and (3.) the private banks which have been already described. The private banks carry on a substantial volume of inter-State business, amounting to about 15 per cent. of their total business, and some of them act as bankers for certain of the States. The Act does not differentiate, or authorize a differentiation, between their inter-State and intra-State business. It has not been suggested that it would be possible to do so. They are already under a large measure of control by the Commonwealth Bank under the Banking Act of 1945, the provisions of which Act have not been challenged in these proceedings. The expansion of the Commonwealth Bank is one of the avowed objects of the Act and must inevitably follow from the prohibition of private banking. Since the appellants rely on it for one part of their argument, it may be well to repeat that s. 11 of the Act imposes on the Commonwealth Bank the duty:

> " (*a*) to provide, in accordance with the conditions " appropriate in the normal and proper conduct of banking " business, adequate banking facilities for any State or " person requiring them;
>
> " (*b*) to conduct its business without discrimination " except on such grounds as are appropriate in the normal " and proper conduct of banking business; and
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> " (*c*) to observe, except as otherwise required by law, the "practices and usages customary among bankers and, in " particular, not to divulge any information relating to, " or to the affairs of, a customer of the Commonwealth

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"Bank except in circumstances in which it is, in accordance "with law or the practices and usages customary among "bankers, necessary or proper for the Commonwealth "Bank to divulge that information."

These being the relevant facts, their Lordships turn first to what has been called the severability point. It is enacted by s. 6 of the Act as follows:—

"It is hereby declared to be the intention of the Parliament

"(*a*) that if any provision of this Act is inconsistent with "the Constitution, that provision and all the other pro-"visions of this Act shall nevertheless operate to the full "extent to which they can operate consistently with the "Constitution;

"(*b*) that the provisions of the last preceding paragraph "shall be in addition to, and not in substitution for, the "provisions of section fifteen A of the Acts Interpretation "Act, 1901-1941; and

"(*c*) that this section and section fifteen A of the Acts "Interpretation Act, 1901-1941, shall have effect notwith-"standing that their operation may result in this Act having "an effect different, or apparently different, in substance, "from the effect of the provisions contained in this Act in "the form in which the Act was enacted by Parliament."

Taking into consideration the wide terms of this section supplementing those of s. 15A of the Acts Interpretation Act, 1901-1941, their Lordships have come with some hesitation to the conclusion that s. 46 is severable from the invalidated provisions of the Act and that its validity must be tested as if it were a separate enactment. It may be observed, however, that, since, as will appear, so regarded it falls by its own offence against s. 92, it is an academic question whether it should suffer from association with other sections. The further question, whether the validity of any part of s. 46 can be maintained if other parts of it are invalid, is in the same sense academic: it will not help the appellants, if, for example, sub-ss. (1) to (3) inclusive can be considered as one enactment and sub-ss. (4) to (8) as another. But, since the matter has been argued before them, their Lordships state their opinion that on its true construction s. 46 contains one indivisible scheme, no part of which can be severed from the rest. Sub-section (1) contains the primary enactment, the prohibition of private banking: sub-s. (2), which is barely intelligible except by reference to provisions for compulsory acquisition now excised from the Act, is intended to ensure an orderly continuance of banking facilities, until the private banks are dissolved, by compelling each of them to carry on its business "subject to the section." From the date specified by notice given by the Treasurer under sub-s. (4), or a substituted date (sub-ss. (6) and (7)), the bank to which notice has been given must not carry on business in Australia (sub-s. (8)). There is on the true construction of the section a single indivisible scheme by which the extinction of all private banking is to be brought about immediately or step by step at the will of the Treasurer. It is on this footing that the validity of the section will be examined. As was observed by the learned Chief Justice in the course of his judgment: "There is no doubt that the provisions mentioned are directed "towards putting the plaintiff banks out of business or that, "if put into operation, they will achieve that result." From this way of stating the problem the appellants do not shrink. The question, then, is whether an Act which, leaving untouched the Commonwealth and State Banks, authorizes the total prohibition of all private banking, offends against s. 92.

The problem being thus stated, the first question that must be answered is whether a prohibition of banking business is in any view within the ambit of s. 92. This question can itself be resolved into two questions: (1.) is the business of banking included among those activities described as trade, commerce and intercourse in s. 92? (2.) If not, is a prohibition of private banking, involving the denial of a choice of banking facilities to those engaged in trade and commerce among the States, a restriction on the freedom of that trade and commerce which is guaranteed by s. 92? Concluding, as they do, that the first question must be answered in the affirmative, their Lordships do not think it necessary to discuss the second, which presents many difficulties. It is in their opinion clear that such words as trade, commerce and intercourse are not naturally susceptible of such a narrow interpretation as the appellants would put on them. And, if they may say so with all respect to the learned Chief Justice who has taken the opposite view, it would be contrary to the trend of judicial decision both in Australia and (so far as that is relevant) in the United States of America to hold otherwise. The view which at one time appeared to be put forward in argument, that the words in s. 92 "whether by means of "internal carriage or ocean navigation" restricted its operation to such things and persons as are carried by land or sea, has long since been rejected and cannot be entertained. The business of banking, consisting of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred activities, is a part of the trade, commerce and intercourse of a modern society and, in so far as it is carried on by means of inter-State transactions, is within the ambit of s. 92. On this part of the case they respectfully adopt the language and reasoning of Dixon J., to which they can add nothing.

The business of banking being an activity of which the freedom is protected by s. 92, the next question is whether the Act offends that section, and their Lordships turn at once to the cases of *James* v. *Cowan* (1) and *James* v. *The Commonwealth* (2). Of these two cases the more important, for what it decided, is *James* v. *Cowan* (1). The facts in *James* v. *Cowan* (1) can only be understood if they are read in conjunction with the earlier case of *James* v. *State of South Australia* (3). James carried on business in South Australia as a grower and producer of dried fruits and in the course of it sold his products outside that State. For reasons, which have been many times stated in judgments of this Board and of the High Court and need not be repeated, the Commonwealth and certain of the States, including South Australia, had recourse to legislation to deal with the whole question of marketing dried fruits. In 1924 the South Australian legislature enacted the Dried Fruits Act, 1924. The material provisions of this Act are set out at large in the judgment of *James* v. *Cowan* (1). It is essential only to notice that the Act contained two sections, s. 20 and s. 28, each of which authorized an interference with the free disposal by the grower of his products, s. 20 by empowering the Dried Fruits Board, which was established under the Act, in its absolute discretion to determine where and in what quantities the output of dried fruits produced in any year should be marketed, and s. 28 (which was expressed to be subject to s. 92 of the Constitution) by empowering the Minister to purchase by agreement, or acquire compulsorily, any dried fruits in South Australia grown and dried in Australia subject to certain exceptions which need not be particularized.

In the earlier case of *James* v. *State of South Australia* (3) it was in the first place the validity of s. 20 of the Act and of

(1) [1932] A. C. 542.
(2) [1936] A. C. 578.
(3) 40 C. L. R. 1.

determinations made under it that came in question, and it was held by the whole court (Isaacs A.C.J., Gavan Duffy, Rich, Starke and Powers JJ.) that that section, so far as it authorized a determination by the Board limiting the quantities of dried fruits which might be marketed within the Commonwealth, was obnoxious to s. 92. From the decision of the High Court no appeal was brought to this Board. But, s. 20 failing him, the Minister of Agriculture in South Australia sought to make use of his powers under s. 28. Once more James invoked s. 92 of the Constitution, and in the case of *James* v. *Cowan* (1) challenged the validity of the executive action taken under s. 28, and it was in this case when it came before the Board that the decision was given, which, as their Lordships think, goes far to determine the present case. For, as part of the ratio decidendi of the case and by no means obiter or by way of a historical narrative, the Board expressly affirmed the decision of the High Court in *James* v. *State of South Australia* (2). The primary importance of the decision lies in this, that in regard to s. 20, Lord Atkin, delivering the opinion of the Board, said (3): "In the result, therefore, "one returns to the precise situation created by s. 20 with "its determination of where and in what quantities the fruit "is to be marketed. Section 20 and the determinations are "invalid, and for precisely the same reasons it appears to their "Lordships inevitable that the exercise of the powers of the "Minister, crediting him with the precise object and intention "found by the High Court, were also invalid."

Before further examining what is involved in this decision their Lordships think it convenient to note what was actually decided in the other of the two cases which have come before them. In *James* v. *The Commonwealth* (4) it was a similar Act, but in this case an Act of the Commonwealth, that was under attack, and the substantial issue was whether the Commonwealth, as well as the States, was bound by s. 92. If it was bound, then the further question arose whether the Act in question was obnoxious to s. 92. The decision of the Board was that the Commonwealth was bound by s. 92, and it is significant that the judgment thus proceeds (5): "For "these reasons their Lordships are of opinion that s. 92 binds "the Commonwealth. On that footing it seems to follow "necessarily that the Dried Fruits Act, 1928-35, must be

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(1) [1932] A. C. 542.
(2) 40 C. L. R. 1.
(3) [1932] A. C. 559.
(4) [1936] A. C. 578.
(5) Ibid. 633.

" held to be invalid. On the interpretation of ' free ' in s. 92, " the Acts and the Regulations either prohibit entirely, if " there is no licence, or if a licence is granted, partially prohibit " inter-State trade. Indeed, the contrary was but faintly " contended if the Commonwealth were held to be bound by " the section." There does not in fact appear to have been any ground for contending that, if the Act which was challenged in *James* v. *Cowan* (1) was invalid, that challenged in *James* v. *The Commonwealth* (2) could be valid.

It might well appear that these two decisions were a serious obstacle to the present appellants' case. Section 20 of the South Australian Act was invalid. It was general in its terms : it did not discriminate between inter-State and intra-State trade in dried fruits. But because it authorized a determination at the will of the Board, the effect of which would be to interfere with the freedom of the grower to dispose of his products to a buyer in another State, it was invalid. And for the same reason the Commonwealth Act fell. The necessary implications of these decisions are important. First may be mentioned an argument strenuously maintained on this appeal that s. 92 of the Constitution does not guarantee the freedom of individuals. Yet James was an individual and James vindicated his freedom in hard won fights. Clearly there is here a misconception. It is true, as has been said more than once in the High Court, that s. 92 does not create any new juristic rights, but it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and, if necessary, to call on the judicial power to help him to resist, legislative or executive action which offends against the section. And this is just what James successfully did.

Linked with the contention last discussed was another which their Lordships do not find it easy to formulate. It was urged that, if the same volume of trade flowed from State to State before as after the interference with the individual trader, and it might be, the forcible acquisition of his goods, then the freedom of trade among the States remained unimpaired. In the first place, this view seems to be in direct conflict with the decisions in the *James* cases (supra) ; for there the section was infringed though it was not the passage of dried fruit in general, but the passage of the dried fruit of James, from State to State that was impeded. Secondly, the test of total volume is unreal and unpractical, for it is unpredictable

(1) [1932] A. C. 542.

(2) [1936] A. C. 578.

whether by interference with the individual flow the total volume will be affected, and it is incalculable what might have been the total volume but for the individual interference. Thirdly, whether or not it might be possible, if trade and commerce stood alone, to give some meaning to this concept of freedom, in s. 92 " trade and commerce " are joined with " intercourse," and it has not been suggested what freedom of intercourse among the States is protected except the freedom of an individual citizen of one State to cross its frontier into another State or to have such dealings with citizens of another State as his lawful occasions may require.

The bearing of those decisions with their implications on the present appeal is manifest. Let it be admitted, let it, indeed, be emphatically asserted, that the impact of s. 92 on any legislative or executive action must depend on the facts of the case. Yet it would be a strange anomaly if a grower of fruit could successfully challenge an unqualified power to interfere with his liberty to dispose of his produce at his will by an inter-State or intra-State transaction, but a banker could be prohibited altogether from carrying on his business both inter-State and intra-State and against the prohibition would invoke s. 92 in vain. In their Lordships' opinion there is no justification for such an anomaly. On the contrary, the considerations which led the Board to the conclusion that s. 20 of the South Australian Dried Fruits Act, 1924, offended against s. 92 of the Constitution lead them to a similar conclusion in regard to s. 46 of the Banking Act, 1947. It is no answer that under the compulsion of s. 11 of the Act the Commonwealth Bank will provide the banking facilities that the community may require, nor, if anyone dared so to prophesy, that the volume of banking would be the same. Nor is it relevant that the prohibition affects the intra-State transactions of a private bank as well as its inter-State transactions : so also in the *James* cases (supra) there was no discrimination : his fruit, for whatever market destined, was liable to be the subject of a " determination."

Yet it is on these very decisions, and in particular on that in *James* v. *The Commonwealth* (1) that the appellants rely. The third of their reasons in their formal Case is that " the " decision of the majority of the High Court in relation to " s. 92 is inconsistent with the decisions of the Judicial Com" mittee [in the two cases cited]."

(1) [1936] A. C. 578.

It appears to their Lordships that this contention ignores the actual decisions and is based on a misapprehension of certain language used in the judgments of the Board. In *James* v. *Cowan* (1) Lord Atkin speaks of s. 20 and the determinations made under it as " directed at inter-State commerce " as such." Elsewhere he speaks of the " objects " of the Minister and the Board, and of the " real object " of arming the Minister with a certain power. It is possible that this language is open to misconception. But, in whatever sense the word " object " or " intention " may be used in reference to a Minister exercising a statutory power, in relation to an Act of Parliament it can be ascertained in one way only, which can best be stated in the words of Lord Watson in *Salomon* v. *Salomon & Co.* (2) : " In a court of law or equity, what the " legislature intended to be done or not to be done can only " be legitimately ascertained from that which it has chosen " to enact, either in express words or by reasonable and " necessary implication." The same idea is felicitously expressed in an opinion of the English law officers Sir Roundell Palmer and Sir Robert Collier cited by Isaacs J. in *James* v. *Cowan* (3) : " It must be presumed that a legislative body " intends that which is the necessary effect of its enactments : " the object, the purpose and the intention of the enactment, " is the same." The same learned judge adds : " By the " 'necessary effect,' it needs scarcely be said, those learned " jurists meant the necessary legal effect, not the ulterior effect " economically or socially." It was because s. 20 of the Dried Fruits Act of South Australia operated according to the natural meaning of its words to authorize a direct restriction on the manner in which James could dispose of his product by an inter-State transaction that it offended against s. 92, not because some other extraneous purpose, object or intention was ascribable to the South Australian legislature.

So also, in *James* v. *The Commonwealth* (4), Lord Wright in delivering the opinion of the Board uses somewhat similar language : he speaks of the " real object " of an Act (5), and of " its admitted object " (6), citing words used by Lord Atkin in the earlier case, and again of an Act being " directed " against " or " aimed at " a particular result. On these expressions the appellants have fastened, contending that an

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(1) [1932] A. C. 542, 555.
(2) [1897] A. C. 22, 38.
(3) 43 C. L. R. 386, 409.
(4) [1936] A. C. 578.
(5) Ibid. 618.
(6) Ibid. 622.

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Act cannot offend against s. 92 unless it can be shown that the intention of the legislature was to interfere in some way with inter-State trade, and they go on to say that in the Banking Act, 1947, there is to be found no intention to interfere with inter-State trade : that Act, they say, is not directed or aimed at such trade. To this their Lordships would say that the test is clear ; does the Act, not remotely or incidentally (as to which they will say something later) but directly, restrict the inter-State business of banking ? Beyond doubt it does since it authorizes in terms the total prohibition of private banking. If so, then in the only sense in which those words can be appropriately used in this case, it is an Act which is aimed or directed at, and the purpose, object and intention of which is to restrict, inter-State trade, commerce and intercourse.

It is not however only on a misunderstanding of the expressions last mentioned that the appellants base their claim that *James* v. *The Commonwealth* (1) is decisive in their favour. They further find support in such phrases as " freedom as at " the frontier or . . . . in respect of goods passing into or " out of the State " (2) and " freedom at what is the crucial " point in inter-State trade, that is at the State barrier " (3), which are to be found in the course of the judgment in that case. These words must (as must every word of every judgment) be read secundum subjectam materiam. They were appropriate to their context and must be read in their context. They cannot be interpreted as a decision either that it is only the passage of goods which is protected by s. 92 or that it is only at the frontier that the stipulated freedom may be impaired. It is not to be doubted that a restriction, applied not at the border but at a prior or subsequent stage of inter-State trade, commerce or intercourse, may offend against s. 92. Nor, as their Lordships hold, in accordance with the view long entertained in Australia, is it in respect of the passage of goods only that such trade, commerce and intercourse is protected.

Lastly, the judgment in *James* v. *The Commonwealth* (1) was invoked by the appellants on the ground that it contained expressions of approval of certain decisions previously given by the High Court of Australia, and (so the argument ran), if those decisions were right, then the judgment of the High Court in the present case could not be maintained. This is a dangerous line of argument. It is true that in the course of a narrative of the leading High Court decisions on s. 92 Lord Wright observed in regard to a passage in the judgment of Evatt J. in *Vizzard* v. *The King* (1): " If this reasoning, " which in *Vizzard's* case (1) was primarily applied to the " States, is, as it seems to be, correct, then in principle it " applies mutatis mutandis to the Commonwealth's powers " under s. 51 (1) . . . ." (2). But it does not appear to their Lordships that the whole of that learned judge's reasoning received the considered approval of the Board. Nor, even if it were otherwise, would it follow that the judgment of the High Court in the present case could not be maintained. " In every case " it was said in the same case, " it must be " a question of fact whether there is an interference with this " freedom of passage " (3). The facts in relation both to subject-matter and to manner of restriction or interference are so widely different in the two cases that it is difficult to apply to one case all that was said in the other. In this connexion it may be noted that in *James* v. *Cowan* (4) their Lordships observed that they found themselves " in accord " with the convincing judgment delivered by Isaacs J. in " the High Court." The decisions in *James* v. *Cowan* (4) and in *Vizzard's* case (1) may be reconciled : it would not be easy to reconcile all that was said by Evatt J. in the one case with all that was said by Isaacs J. in the other.

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(1) [1936] A. C. 578.

(2) Ibid. 630.

(3) Ibid. 631.

Their Lordships have thought it proper to deal at considerable length with the earlier decisions of this Board because so much reliance was placed on them by the appellants. It is, they think, clear that, far from assisting the appellants these two decisions are, as the respondents have throughout contended, strongly against them.

In observing upon the *James* cases (4) and (5) and their bearing on the present case their Lordships noted that the Act now under consideration operated to restrict the freedom of inter-State trade, commerce and intercourse not remotely or incidentally, but directly. On this, and on a cognate matter, the distinction between restrictions which are regulatory and do not offend against s. 92 and those which are something more than regulatory and do so offend, their Lordships think it proper to make certain further observations. It is generally recognized that the expression " free " in s. 92 though emphasized by the accompanying "absolutely," yet must receive some qualification. It was, indeed, common ground in the present case that the conception of freedom of trade, commerce and intercourse in a community regulated by law presupposes some degree of restriction on the individual. As long ago as 1916 in *Duncan* v. *State of Queensland* (1), Sir Samuel Griffith C.J. said: "But the word 'free' does not "mean extra legem any more than freedom means anarchy. "We boast of being an absolutely free people, but that does "not mean that we are not subject to law," and through all the subsequent cases in which s. 92 has been discussed, the problem has been to define the qualification of that which in the Constitution is left unqualified. In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted: (1.) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (2.) that s. 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the court that can decide the issue. It is vain to invoke the voice of Parliament.

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(1) 50 C. L. R. 30.
(2) [1936] A. C. 622.
(3) Ibid. 631.
(4) [1932] A. C. 542, 561.
(5) [1936] A. C. 578.

Difficult as the application of these general propositions must be in the infinite variety of situations that in peace or in war confront a nation, it appears to their Lordships that this further guidance may be given. In the recent case of *Australian National Airways Proprietary, Ld.* v. *The Commonwealth* (2), the learned Chief Justice used these words: "I "venture to repeat what I said in the former case [viz., "the '*Milk* case' (3): 'One proposition which I regard as "'established is that simple legislative prohibition (Federal

(1) 22 C. L. R. 556, 573.
(2) 71 C. L. R. 29, 61.
(3) 62 C. L. R. 116, 127.

" ' or State), as distinct from regulation, of inter-State trade " ' and commerce is invalid. Further, a law which is " directed " ' " against " inter-State trade and commerce is invalid. " ' Such a law does not regulate such trade, it merely prevents " ' it. But a law prescribing rules as to the manner in which " ' trade (including transport) is to be conducted is not a mere " ' prohibition and may be valid in its application to inter- " ' State trade, notwithstanding s. 92.' " With this statement, which both repeats the general proposition and precisely states that simple prohibition is not regulation, their Lordships agree. And it is, as they think, a test which must have led the Chief Justice to a different conclusion in this case had he decided that the business of banking was within the ambit of s. 92. They do not doubt that it led him to a correct decision in the *Airways* case (1). There he said : " In the present case " the Act is directed against all competition with the inter- " State services of the Commission. The exclusion of other " services is based simply upon the fact that the competing " services are themselves inter-State services. . . . . The " exclusion of competition with the Commission is not a system " of regulation and is, in my opinion, a violation of s. 92 . . . ." (4). Mutatis mutandis these words may be applied to the Act now impugned, for it is an irrelevant factor that the prohibition prohibits inter-State and intra-State activities at the same time.

Yet about this, as about every other proposition in this field, a reservation must be made. For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that inter-State trade, commerce and intercourse thus prohibited and thus monopolized remained absolutely free.

Nor can one further aspect of prohibition be ignored. It was urged by the appellants that prohibitory measures must be permissible, for otherwise lunatics, infants and bankrupts could without restraint embark on inter-State trade, and

(1) 71 C. L. R. 29, 61.

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diseased cattle or noxious drugs could freely be taken across State frontiers. Their Lordships must therefore add, what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them, or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Here again a question of fact and degree is involved which is nowhere better exemplified than in the Potato case (*State of Tasmania* v. *State of Victoria* (1)), where the following passage occurs in the judgment of Gavan Duffy C.J. and Evatt and McTiernan JJ.; "In the "present case it is neither necessary nor desirable to mark "out the precise degree to which a State may lawfully protect "its citizens against the introduction of disease, but, certainly, "the relation between the introduction of potatoes from "Tasmania into the State of Victoria and the spread of any "disease into the latter is, on the face of the Act and the "proclamation, far too remote and attenuated to warrant "the absolute prohibition imposed."

The same difficulty arises in applying the other discriminatory test, that between a restriction which is direct and one that is too remote. Yet the distinction is a real one, and their Lordships have no doubt on which side of the boundary the present case falls. It is the direct and immediate result of the Act to restrict the freedom of trade, commerce and intercourse among the States.

Their Lordships will not attempt to define this boundary. An analogous difficulty in one section of constitutional law, namely, in the determination of the question where legislative power resides, has led to the use of such phrases as "pith and "substance" in relation to a particular enactment. These phrases have found their way into the discussion of the present problem also and, as so used, are the subject of just criticism by the learned Chief Justice. They, no doubt, raise in convenient form an appropriate question in cases where the real issue is one of subject-matter, as when the point is whether a particular piece of legislation is a law in respect of some subject within the permitted field. They may also serve a useful purpose in the process of deciding whether an enactment which works some interference with trade, commerce

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(1) 52 C. L. R. 157, 168–9.

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and intercourse among the States is, nevertheless, untouched by s. 92 as being essentially regulatory in character. But where, as here, no question of regulatory legislation can fairly be said to arise, they do not help in solving the problems which s. 92 presents. Used as they have been to advance the argument of the appellants they but illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit. In the field of constitutional law—and particularly in relation to a federal constitution—this is conspicuously true, and it applies equally to the use of the words " direct " and " remote " as to " pith and substance." But it appears to their Lordships that, if these two tests are applied : first, whether the effect of the Act is in a particular respect direct or remote ; and, secondly, whether in its true character it is regulatory, the area of dispute may be considerably narrower. It is beyond hope that it should be eliminated.

Their Lordships will humbly advise His Majesty that these appeals should be dismissed.

Solicitors for appellants : *Coward, Chance & Co.*

Solicitors for the respondent banks : *Linklaters & Paines ; Farrer & Co. ; Bircham & Co. ; Slaughter & May.*

Solicitors for the respondent States : *Freshfields.*

Solicitors for the intervener States : *Light & Fulton.*

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Mar. 30.

[PRIVY COUNCIL]

BERTRAM WILLES DAYRELL BROOKE AND ANOTHER . . . . . APPELLANTS ;

AND

SIR CHARLES VYNER BROOKE AND OTHERS . . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF THE JUDGE OF APPEAL IN THE STATE OF BRUNEI.

Brunei—Procedure—Service out of the jurisdiction—Courts Enactment, 1908 (*as amended to* 1948), *s.* 5 (*ii*) *; s.* 19*—Civil Procedure Code of the Federated Malay States* (*Laws of the Federated Malay States, c.* 7), *ss.* 64 *to* 67.

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*Present : LORD GREENE, LORD SIMONDS, LORD NORMAND, LORD REID and SIR JOHN BEAUMONT.

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v.
SIR CHARLES VYNER BROOKE.

The first appellant, who was the brother of the third Rajah of Sarawak and the next heir male, after the third Rajah, of the second Rajah, and the second appellant, who was the heir apparent of the first appellant, instituted a suit in 1948 in the Court of the Resident in the State of Brunei against the third Rajah—who by an Instrument of Cession of May 21, 1946, had purported to cede the sovereignty of Sarawak to Great Britain—against two contingent heirs to the Raj under entails created by the will of the first Rajah, and against the trustee under the will for carrying into effect its purposes, claiming, inter alia, a declaration that, on the true construction of certain deeds executed by the Sultan of Brunei and his successor in 1846 and 1853, respectively, and of the provisions made pursuant thereto in the will of the first Rajah, the sovereignty of Sarawak vested inalienably in the third Rajah for his life after the death of the second Rajah. The defendants to the suit all resided in England, and the appellants applied by summons in Chambers to the Court of the Resident in the State of Brunei for an order that the summonses in the suit to each of the defendants be issued for service outside the jurisdiction. The application was refused, and the refusal was upheld by the Court of the Judge of Appeal. On further appeal by the appellants :

Held, that the appeal failed on two separate grounds : first, the suit was not within the descriptions of suits which the courts of Brunei were authorized to entertain by s. 5 (ii) of the Courts Enactment, 1908 (as amended) ; and secondly s. 19 of the Courts Enactment, 1908 (as amended) incorporated and adapted as part of the procedure of civil suits in the courts of Brunei, ss. 64 to 67, inclusive, of the Civil Procedure Code of the Federated Malay States, and, on a sound construction of s. 19 (as amended) and of s. 66 (i) of the Civil Procedure Code, the suit did not comply with the conditions on which the courts of Brunei had a discretion to authorize service out of the jurisdiction.

Order of the Court of the Judge of Appeal affirmed.

APPEAL (No. 31 of 1949), by special leave, from an order of the Court of the Judge of Appeal in the State of Brunei (November 4, 1948) which dismissed an appeal from an order of the Court of the Resident in the State of Brunei (July 21, 1948) refusing leave to issue a summons for service outside the State of Brunei.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee. The appellants, who were the plaintiffs in the suit, were (1.) the brother of the third Rajah of Sarawak and the next heir male, after the third Rajah, of the second Rajah, and (2.) the heir apparent of the first appellant. The defendants, all of whom resided in England, were the third Rajah, two contingent heirs to the

Raj under entails created by the will of the first Rajah, and the trustee under the said will for the purposes thereof related to the transmission of the sovereignty of Sarawak. The suit was instituted in the Court of the Resident in the State of Brunei by a plaint which was admitted by the court on July 14, 1948. The plaint claimed :—

(i) A declaration that—on the true construction of the deed executed by His Highness the Sultan of Brunei on August 2, 1846, and of the deed executed by His Highness the Sultan of Brunei on August 24, 1853, and of the provisions made pursuant to such deeds in the will executed by Sir James Brooke (the first Rajah of Sarawak) on April 15, 1867 :—

(*a*) after the death of the said Sir James Brooke and on payment by his nephew, Sir Charles Johnson Brooke, to His Highness the Sultan of the sum of four thousand dollars as tribute and on the said Sir Charles Johnson Brooke taking the oath of accession as the second Rajah of Sarawak, the sovereignty of Sarawak vested inalienably in the said Sir Charles Johnson Brooke for his life ;

(*b*) the heir male of the said Sir Charles Johnson Brooke was the defendant Sir Charles Vyner Brooke, and after the death of the said Sir Charles Johnson Brooke, and on payment by the said Sir Charles Vyner Brooke to His Highness the Sultan of the aforesaid tribute of four thousand dollars and on the said Sir Charles Vyner Brooke taking the oath of accession as the third Rajah of Sarawak, the sovereignty of Sarawak vested inalienably in the said Sir Charles Vyner Brooke for his life ;

(*c*) in default of an heir entitled to succeed to the Raj of Sarawak under the entails created by the aforesaid will dated April 15, 1867, and willing to pay to His Highness the Sultan the aforesaid tribute of four thousand dollars and to take the aforesaid oath of accession, the sovereignty of Sarawak and the State funds and other assets thereunto appertaining reverted to His Highness the Sultan ;

(*d*) the plaintiff (now the appellant) Bertram Willes Dayrell Brooke was, after the said Sir Charles Vyner Brooke, the next heir male of the said Sir Charles Johnson Brooke ;

(*e*) the plaintiff (now the appellant) Anthony Walter Dayrell Brooke was the heir apparent of the said Bertram Willes Dayrell Brooke ;

(*f*) on the accession, after the death of the said Sir James Brooke, of each succeeding Rajah of Sarawak, there vested in him as aforesaid the sovereignty of the said Raj, and the State funds and other assets thereunto appertaining so vested in him as Rajah and not for his private account ;

(ii) an account by the said Sir Charles Vyner Brooke of all moneys (other than his normal personal emoluments as Rajah of Sarawak) transferred from the said State funds to his private account prior to May 21, 1946, and of the disposal thereof.

On July 14, 1948, the appellants applied by summons in Chambers to the Court of the Resident in the State of Brunei for an order that the summons in the suit to each of the defendants be issued for service outside the jurisdiction. The application was refused on July 21, 1948, and an appeal against the order was dismissed by the Judge of Appeal on November 4, 1948. Special leave to appeal was granted on May 31, 1949, and thereafter one of the defendants, Charles James Vyner Craig Brooke, submitted to the jurisdiction of the courts of Brunei.

The historical events which led to the institution of the suit and which were necessary for a proper understanding of the claims and of the purpose of the suit could be briefly narrated. The State of Sarawak was before 1846 a province of the State of Brunei, but on August 2, 1846, the then Sultan of Brunei granted the province of Sarawak in sovereignty to James Brooke, afterwards Sir James Brooke, subject to a payment of 4,000 Spanish dollars by the successor on the grantee's death. That grant was confirmed by the Sultan's successor on August 24, 1853. Sir James Brooke, the first Rajah of Sarawak, by his will bequeathed the sovereignty to his nephew Charles Johnson Brooke and the heirs male of his body lawfully issuing, and in default of such issue to his nephew Stewart Johnson and the heirs male of his body lawfully issuing, and in default of such issue unto Her Majesty the Queen of England and her heirs and assignees for ever. On Sir James Brooke's death Sir Charles Johnson Brooke succeeded, and on his death the defendant Sir Charles Vyner Brooke. He executed an Instrument of Cession, dated May 21, 1946, by which he purported to cede the sovereignty of Sarawak to Great Britain and by Order in Council of June 26, 1946, Sarawak was annexed. Their Lordships of the Board were informed that if the appellants were to obtain a judicial declaration to the effect that Sir Charles Vyner Brooke was not entitled to cede the sovereignty of Sarawak, they might petition His Majesty in Council to annul or vary the Order in Council of June 26, 1946.

By the Courts Enactment, 1908, as amended by later enactments :

> Section 4 (i) (as amended by the Courts Enactment, 1908, Amendment Enactment, 1920, and as further amended by the Courts (Amendment) Enactment, 1948) : " The " Court of the Resident shall consist of (*a*) the Resident, " or (*b*) a Circuit Judge of one of the Circuit Courts of the " Colony of Sarawak. It shall have and exercise such " original and appellate jurisdiction in civil and criminal " matters as is hereinafter provided."
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> Section 5 (i) : " The said Court shall, subject to the " provisions of this and of all other Enactments for the " time being in force, have jurisdiction in all suits, matters, " and questions of a civil nature, excepting only that nothing " herein contained shall be deemed to authorize any Court " in the State to dissolve or annul a marriage lawfully " solemnized between Christians in the United Kingdom " of Great Britain and Ireland or in any British Colony, " Protectorate, or Possession."
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> Section 5 (ii) : " In amplification and not in derogation " of the generality of the foregoing powers, the said Court " may try all suits by and against all persons and bodies " corporate, in all cases where the persons who are defendants " are persons in the State, or the corporate body which is " defendant has an establishment or place of business " in the State ; and also in the following cases, although " the defendant is not present or has not its establishment " as aforesaid in the State, that is to say, if the defendant " has property in the State ; or if the whole or any part " of the subject matter of the suit is land or stock or other " property situate within the State ; or where any act, " deed, will, or thing affecting such land, stock, or property " was done, executed, or made within the State ; and " whenever the contract which is sought to be enforced or " rescinded, dissolved, annulled, or otherwise affected in " any such suit, or for the breach whereof damages or " other relief are or is demanded in such suit, was made or " entered into, or was to be performed or partly performed,

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" within the State; and whenever there has been a breach " within the State of any contract wherever made; and " whenever any act or thing sought to be restrained or " removed, or for which damages are sought to be recovered, " was or is to be done or is situate within the State; or " if the cause of action arose in the State; or if the subject " of the proceedings otherwise falls, on general principles " of international law or comity, to be determined by the " law of the State. In suits founded on contract, 'cause " 'of action' as used in this section shall not necessarily " mean the whole cause of action, but a cause of action " shall be deemed to have arisen within the jurisdiction " if the contract was made therein, though the breach " may have occurred elsewhere, and also if the breach " occurred within the jurisdiction, though the contract " may have been made elsewhere."

Section 19 (as amended by s. 7 of the Courts (Amendment) Enactment, 1941): "The procedure to be followed in civil " actions and proceedings in the Court of the Resident " and in Magistrates' Courts, and the procedure to be " followed in prosecuting an appeal from any Magistrate's " Court to the Court of the Resident, shall be that prescribed " by the Civil Procedure Code of the Federated Malay " States in force from time to time in the Federated Malay " States with respect to Magistrate's Courts and the mode " of appeal therefrom, with such alterations as may be " required to suit the circumstances of the State."

The relevant provisions of the Civil Procedure Code of the Federated Malay States were as follows:—

Section 64: "No summons for service on a defendant " out of the Federated Malay States shall be issued by any " Court without the leave of the Supreme Court or of a " judge thereof."

Section 65: "Any party desiring that a summons be " issued for service on a defendant out of the Federated " Malay States shall deliver to the Registrar of the Supreme " Court the summons and copy which he desires to issue, " and the title of the intended suit shall be entered in the " register of civil suits of the Court in which the said suit " is to be instituted, and the next serial number shall " provisionally be assigned to such summons. The application for leave to issue shall be by summons in Chambers, " and, on production of the summons bearing a note or

" memorandum, signed by the Registrar, giving leave for " the issue of a summons, the summons, completed in " accordance with the terms of such order, shall be sealed " and issued."

Section 66 (i): " Service out of the Federated Malay States " may be allowed by the Supreme Court or a Judge thereof " whenever—

" (*a*) the whole subject-matter of the suit is immovable " property situate within the Federated Malay States " (with or without rents or profits); or

" (*b*) any act, instrument, will, contract, obligation, " or liability affecting immovable property situate within " the Federated Malay States is sought to be construed, " rectified, set aside, or enforced in the suit; or

" (*c*) any relief is sought against any person domiciled " or ordinarily resident within the Federated Malay " States; or

" (*d*) the action is for the administration of the estate " of any deceased person, who, at the time of his death, " was domiciled, or ordinarily resided, or carried on " business within the Federated Malay States, or for the " execution (as to property situate within the Federated " Malay States) of the trusts of any written instrument, " of which the person to be served is a trustee, which " ought to be executed according to the law of the " Federated Malay States; or

" (*e*) the action is founded on the breach or alleged " breach, within the Federated Malay States of any " contract wherever made, which according to the terms " thereof ought to be performed within the Federated " Malay States even though such breach was preceded " or accompanied by a breach out of the Federated " Malay States which rendered impossible the performance " of the part of the contract which ought to have been " performed within the Federated Malay States; or

" (*f*) the action is founded on a tort committed within " the Federated Malay States; or

" (*g*) any injunction is sought as to anything to be " done within the Federated Malay States, or any nuisance " within the Federated Malay States is sought to be " prevented or removed, whether damages are or are " not also sought in respect thereof; or "(*h*) any person out of the Federated Malay States "is a necessary or proper party to a suit properly brought "against some other person duly served within the "Federated Malay States.

"(ii) Any order giving leave to effect such service shall, "unless the mode of service be prescribed by this Code, "direct in what mode service is to be effected, and the "reasonable expenses of such service shall be allowed.

"67. Every application for leave to issue a summons "for service on a defendant out of the Federated Malay "States shall be supported by an affidavit or other evidence, "stating that, in the belief of the deponent, the applicant "has a good cause of action, and showing in what place "or country such defendant is or probably may be found, "the ordinary means of communication with such place "or country, and the grounds on which the application "is made; and no such leave shall be granted unless it "is made sufficiently to appear to the Court or Judge that "the case is a proper one for service out of the Federated "Malay States under this section. A copy of the plaint "shall be filed with the application."

1950. Feb. 28. *Sir David Maxwell Fyfe K.C.* and *Theodore Page* for the appellants. The appellants, the plaintiffs in the suit, dispute the validity of the purported cession of Sarawak to the British Government on May 21, 1946, and they contend that the proper court in which to dispute it is the Resident's Court of the State of Brunei, because the question is one of the construction of deeds executed in Brunei by the Sultan of Brunei relating to the original grant of Sarawak, which was then a province of Brunei, and with regard to which tribute has always continued to be paid. On general principles of international law and comity, that question should be decided in Brunei. As to the position vis-à-vis the British Crown, an Order in Council was made making Sarawak the property of the British Crown; and that Order in Council contains a provision that it is revocable. The only way in which the effect of this action might influence the position is that, if the appellants succeed in the action and show that the cession was illegal, then it would be a matter for the advisers of the Crown whether they would revoke the Order in Council taking Sarawak. The Crown might disregard the result of the action; that is a matter of policy. This appeal is simply against the refusal to allow service out of the jurisdiction. The defendants (respondents) are all in England. There is only one further point of history, namely, that on January 31, 1950, i.e., after special leave had been given, the respondent Charles James Vyner Craig Brooke, one of the contingent heirs, submitted to the jurisdiction of the courts of Brunei.

The main point in the appeal is whether the provisions of s. 66 of the Civil Procedure Code of the Federated Malay States (which, broadly speaking, reproduces the provisions of Or. 11, r. 1, of the Rules of the Supreme Court in England regarding service outside the jurisdiction) override the provisions of s. 4 (i) and s. 5 of the Courts Enactment, 1908, as amended, of the State of Brunei which, it is submitted, give the Court of the Resident in the State of Brunei compulsory jurisdiction over absent defendants in a case such as the present. The courts of Brunei have said that the rules giving leave for service outside the jurisdiction are the same in Brunei as in England and that the courts have a complete discretion in the matter. It is submitted that by the law of Brunei leave must be given ex debito justitiae provided that the subject-matter of the suit is shown to be within s. 5 (ii) of the Courts Enactment, 1908, as amended. The law of Brunei is not on the same basis in this matter as that of England, but is on quite as logical and as well-known a basis, which is that the court shall have jurisdiction in certain specified cases as set out in s. 5 (ii); and the only difficulty which the appellants have to face is the possibility that " may " in s. 5 (ii) indicates a discretionary matter; but it follows the word " shall," which is mandatory, and enabling words are always compulsory.

The claim in the suit for the declarations falls within the following clauses in s. 5 (ii), first, " where any act, deed, will, " or thing affecting such land, stock or property was done, " executed, or made within the State " ; secondly, " whenever " the contract which is sought to be enforced or rescinded, " dissolved, annulled, or otherwise affected in any such suit, " or for the breach whereof damages or other relief are or is " demanded in such suit, was made or entered into, or was to " be performed or partly performed within the State." There is here a grant in the nature of a contract by the Sultan in which the donee undertakes an obligation of paying a tribute: it is a grant with a contractual term on the part of the donee. The third clause is, " if the subject of the

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"proceedings otherwise falls, on general principles of inter-"national law or comity, to be determined by the law of "the State."

Considering the position here, the deeds were executed by Sultan of Brunei, in Brunei; the subject-matter of the suit is territory which was at the time of the deeds a province of the State of Brunei; and that territory has been held on tribute payable to the Sultan. [For the general principles of international law or comity reference was made to *Earl of Derby* v. *Duke of Athol* (1).] Here, in the clearest words, s. 5 enacts that, although the defendant is not present in the State, the court may try the suits therein specified. [Reference was made to *Quebec Railway, Light, Heat and Power Co.* v. *Vandry* (2).] Section 5 (ii) is a draft of the complete jurisdiction, and under s. 19 the procedure of ss. 64 and 65 of the Civil Procedure Code of the Federated Malay States has to be followed. All that the judge in Chambers has to decide is, not whether he shall extend his jurisdiction under s. 66 of the Malay Civil Procedure Code—that does not come into it, because the legislating body in Brunei has already indicated the guide in s. 5 (ii)—but whether the cause of action comes within s. 5 (ii) of the Courts Enactment. Section 66 of the Malay Code is the same as Or. 11, r. 1, of this country, and is a discretionary extension of jurisdiction which applies to countries where it is necessary to persuade the court to extend its jurisdiction. In this case, to convince the judge that service should issue outside the jurisdiction, all that has to be shown is that the cause of action is within s. 5 (ii). If, as the Court of the Judge of Appeal has in effect decided, the legislature intended that the provisions of the adopted Civil Procedure Code should override the provisions of the Courts Enactment, 1908, then much of s. 4 (i) and s. 5 of the latter become meaningless surplusage. Section 66 of the Malay Code does not apply to the State of Brunei in derogation of the jurisdiction conferred by s. 4 (i) and s. 5 (ii) of the Courts Enactment, 1908. [Reference was made to *Julius* v. *Lord Bishop of Oxford* (3).]

Lastly, it is submitted that Brunei and Sarawak have an integrated executive and judicial system, and that the existence of property in Sarawak would be a ground for service outside the jurisdiction of Brunei.

(1) (1749) 1 Ves. Sen. 201, 204.

(2) [1920] A. C. 662, 676.

(3) (1880) 5 App. Cas. 214, 241, 245.

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The respondents did not appear and were not represented.

March 30. The judgment of their Lordships was delivered by LORD NORMAND, who stated the facts set out above and continued: The question whether the summons in the suit ought to have been issued for service out of the jurisdiction turns on the construction of the Courts Enactment, 1908 (as amended), of the State of Brunei and the Civil Procedure Code of the Federated Malay States. [His Lordship quoted the relevant provisions of the Courts Enactment, 1908, as amended by later enactments, and of the Civil Procedure Code of the Federated Malay States and continued:] The appellant's counsel submitted as his main contention that under s. 5 (ii) of the Courts Enactment, 1908 (as amended), a plaintiff in a suit within the description of suits set out in the sub-section was entitled ex debito justitiae to an order for service out of the jurisdiction on non-resident defendants, and that s. 19 incorporated only so much of the procedure of the Civil Procedure Code of the Federated Malay States as is contained in ss. 64 and 65 and 66 (ii). This submission treats as inapplicable to the courts of Brunei the provisions of ss. 66 (i) and 67 of the Civil Procedure Code. The effect would therefore be that personal service would be in the State of Brunei " merely a sine qua non before effective action " is allowed," and not, as in England and in the Federated Malay States, " the foundation of jurisdiction " : *Johnson* v. *Taylor Bros. and Co. Ld.* (1); and that the function of the court to which application was made for service outside the jurisdiction would be purely ministerial.

Before examining this submission in its more general aspects their Lordships would observe that it fails in limine. There are in s. 5 (ii) of the Courts Enactment, 1908, no words under which the declarations or the order for an account claimed in this suit can be brought. The claim for an account may be briefly dismissed. It is a claim that the court of one Sovereign State should order the sovereign of another Sovereign State to render an account of moneys which have been collected as public revenue of the State over which he rules. The claim would have been incompetent in the courts of Sarawak; it is not less incompetent in the courts of Brunei and it may be dismissed from consideration. The claim for the declarations

(1) [1920] A. C. 144, 154.

was said to fall within each of three clauses in s. 5 (ii). Of these the first was: "Where any act, deed, will, or thing "affecting such land, stock, or property was done, executed, "or made within the state"; the second: "Whenever "the contract which is sought to be enforced or rescinded, "dissolved, annulled, or otherwise affected in any such suit, "or for the breach whereof damages or other relief are or is "demanded in such suit, was made or entered into, or was "to be performed or partly performed, within the state"; and the third: "if the subject of the proceedings otherwise "falls, on general principles of international law or comity, "to be determined by the law of the State."

The first clause founded on is inapplicable because "such "land" refers back, and can only refer back, to "land within "the State," that is, the State of Brunei; and this suit is concerned not with land in the State of Brunei but with the sovereignty and the land of the State of Sarawak. The second clause does not apply because (inter alia) the suit is not concerned with a contract. Their Lordships cannot assent to the contention that the grant by the Sultan of Brunei to Sir James Brooke was a contract or should be deemed to be a contract. It was, on the contrary, a unilateral deed, and the Sultan's right to the payment of 4,000 Spanish dollars was not a term of a contract but a condition of the grant. The third clause founded on, so far from supporting the appellants' claim, is adverse to it, for the principles of international law or comity would exclude from the jurisdiction of the courts of Brunei any question relating to the sovereignty or the land of Sarawak.

Their Lordships, moreover, are of opinion that the entire argument for the appellants rests on a more general misconstruction of the Courts Enactment, 1908, induced, it may be, by a misunderstanding of the sense in which the word "jurisdiction" is used in s. 4 (i) and s. 5 (i). It is an ambiguous term which may be used when the purpose is to define the kinds of action which a court may competently entertain; or which may be used when the purpose is to define the persons over whom the court may competently exercise its powers of hearing, determining and enforcing its decrees in those actions which it can competently entertain. In the relevant provisions of the Courts Enactment, 1908, the word is used in the first of these senses. Thus s. 4 (i) provides that the Court of the Resident "shall have and exercise such original and appellate

" jurisdiction in civil and criminal matters as is hereinafter " provided." In s. 5 (i) it is provided that the court " shall " have jurisdiction in all suits, matters, and questions of a " civil nature," with an exception not material to the present purpose. In both sub-sections the words " shall have " jurisdiction in " are equivalent to " shall be competent to " entertain." Section 5 (ii) is " in amplification and not in " derogation of the . . . . foregoing powers," and it provides that the court *may* try the defined suits " where the persons " who are defendants are persons in the State . . . . and also " in the following cases, although the defendant is not present " . . . . in the State." The purpose is to define still further the classes of action which the court *may* entertain, and to declare the court's competence to entertain suits of a limited class though the defendant is resident outside the jurisdiction. But the sub-section does not give the court power to hear and determine these suits and to enforce its orders unless the non-resident defendants are duly cited and subjected to the authority of the courts of Brunei.

That appears more clearly from s. 19, which must be read along with s. 5 (ii). By incorporating as " the procedure " to be followed in civil actions and proceedings in the Court " of the Resident and the Magistrates' Courts, and the " procedure to be followed in prosecuting an appeal from any " Magistrate's Court to the Court of the Resident " the procedure prescribed by the Civil Procedure Code of the Federated Malay States, s. 19 incorporates rules for service outside the jurisdiction. Thus there is a complete code defining the courts' jurisdiction in both its meanings, and it is necessary for a plaintiff, who desires to sue a non-resident, first to satisfy the conditions of s. 5 (ii) by showing that the suit is one of those classes of action which the court may entertain when the defendant is a non-resident, and then to show that the conditions which s. 65 (i) prescribes as the conditions for the exercise of the discretion to grant leave to serve out of the jurisdiction are satisfied. The attempt to distinguish between ss. 64, 65 and 66 (ii) of the Civil Procedure Code and ss. 66 (i) and 67 is arbitrary, for all the cited sections of the Civil Procedure Code deal with the procedure to be followed where leave to serve out of the jurisdiction is necessary, and s. 19 incorporates them all without distinction " with such alterations as may be required " to suit the circumstances of the State " of Brunei.

The alterations contemplated are only such adaptations as are necessary to give meaning to the sections of the Civil Procedure Code when it is applied to the circumstances of the courts of Brunei. In s. 64, for example, the words "the "Federated Malay States" must be read as equivalent to "the State of Brunei," and the words "Supreme Court" as equivalent to "the Court of the Resident." Similarly, s. 66 (i) (*a*) must be adapted to read "service out of the "jurisdiction of the State of Brunei may be allowed by the "Court of the Resident whenever the whole subject of the "suit is immovable property situate in the State of Brunei"; and the other paragraphs of s. 66 (i) must be adapted accordingly. The effect of this adaptation of s. 66 (i) is admittedly fatal to the appeal, and the appellants therefore submitted an alternative construction of the adaptation clause in s. 19 and an alternative method of applying the Civil Procedure Code of the Federated Malay States to the courts of Brunei. They said that it should be applied as though Brunei and Sarawak were members of the Federation. Under s. 66 the courts of one of the member States (e.g., Perak) can authorize service out of the jurisdiction (e.g., in England) in a suit concerning immovable property situated either in that State or in another member State (e.g., Pahang); therefore, it was said, service should be permitted out of the jurisdiction of the Brunei courts in a case concerning immovable property situated either in Brunei itself or in the adjoining territory of Sarawak, inasmuch as the Chief Justice of Sarawak is the Head of the Judiciary of Brunei, and the High Commissioner for Brunei is the Chief Executive Officer for Sarawak; in other words, the judicial system of Brunei is integrated with the judicial system of Sarawak in the same way that, for instance, the judicial system of Perak is integrated with the judicial system of Pahang.

The adaptation clause of s. 19 of the Courts Enactment, 1908, is incapable of bearing the tortuous and fanciful meaning assigned to it. The States of Brunei and Sarawak were independent Sovereign States, and s. 19 did nothing to create between them a relation resembling a federal relation or to impose on them a conception of jurisdiction appropriate only to members of a federation.

The conclusion of their Lordships is that the appeal fails on two separate grounds: (I.) the suit is not within the descriptions of suits which the courts of Brunei are authorized

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to entertain by s. 5 (ii) of the Courts Enactment, 1908 (as amended); and (2.) s. 19 of the Courts Enactment, 1908 (as amended) incorporates and adapts as part of the procedure of civil suits in the courts of Brunei ss. 64 to 67 inclusive of the Civil Procedure Code of the Federated Malay States; and, on a sound construction of s. 19 (as amended) and of s. 66 (i) of the Civil Procedure Code, the suit does not comply with the conditions under which the courts of Brunei have a discretion to authorize service out of the jurisdiction. That was also the conclusion of the learned Judge of Appeal, to whose clear and satisfactory opinion their Lordships would acknowledge their indebtedness.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed.

Solicitors: *William Charles Crocker.*

[HOUSE OF LORDS.]

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Jan. 16, 17; *Mar.* 21.

BOISSEVAIN . . . . . . APPELLANT;

AND

WEIL . . . . RESPONDENT.

Emergency legislation—Currency control—Loan of foreign currency during war—Promise to repay in sterling after war—Parties involuntarily resident in foreign country in military occupation of enemy—Repudiation of transaction by borrower—Illegality of loan—Defence (Finance) Regulations, 1939 (*St. R. & O.* 1939, *No.* 1620), *reg.* 2, *as amended by St. R. & O.* 1940, *No.* 1484.

A British subject involuntarily resident in enemy-occupied territory in 1944 borrowed foreign currency from a Dutch subject likewise so resident, agreeing to repay it in England in sterling after the war as soon as English law permitted.

Held, that the sum was irrecoverable as a debt, the transaction being a borrowing of foreign currency contrary to reg. 2 of the Defence Finance Regulations, 1939, to which no exception could be implied in the case of British subjects for the time being in enemy territory.

**Present:* LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT and LORD RADCLIFFE.

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Held further, that, the claim in the pleadings being in terms confined to the enforcement of the loan agreement, it was not open to the courts to entertain an alternative claim for money had and received on the principle of "unjust enrichment."

Decision of the Court of Appeal [1949] 1 K. B. 482, affirmed.

APPEAL from the Court of Appeal (Tucker, Asquith and Denning, L.JJ.).

The facts, as stated by LORD RADCLIFFE, were as follows: On June 10, 1944, Laurens Boissevain, the appellant, placed in the hands of Mrs. Dora Weil, the respondent, Bank of France notes for 320,000 francs. The respondent had applied to him for a loan, since she was apparently in need of money wherewith to try to purchase for her son, a Jew, exemption from being deported to Germany. It was common ground throughout that whatever money was made available by the appellant should be repaid in sterling. The site of this transaction was the Principality of Monaco, in which French francs were legal currency. Of the two parties, the respondent had taken up residence on the south coast of France some twenty years before the trial, though retaining at all times British citizenship, and at the outbreak of war in 1939 was ordinarily resident in Monte Carlo; the appellant, who was a Dutch subject with a domicile in Holland, had been living in France on business before the war and in 1941 had succeeded in escaping from that country to what may have been the somewhat greater security of the Principality of Monaco.

The agreement which the parties came to was accompanied by, if it did not consist of, certain documents which the respondent signed and handed to the appellant. Evidently she had told him that she had an account at the Baker Street branch of the National Provincial Bank in London. Accordingly, there was a cheque for 2,000*l.* sterling, signed by her and drawn upon that branch of that bank: the space for the payee's name was left blank. There was a letter signed by her and addressed to the manager of that branch, stating that she had issued the cheque, requesting him to honour it "on presentation or as soon as the law permits its payment" and recognizing the debt of 2,000*l.* sterling as an obligation binding her estate in the event of her dying before presentation: and another letter, similarly signed and addressed to her solicitor in London, asking him to give his full attention to seeing that the cheque was paid as soon as the law allowed it. Lastly, there was a letter in French over the signature of the respondent certifying that she had addressed her letter to the bank manager and given her cheque of the same date and undertaking that, if payment could not be obtained on presentation of the letter and cheque, she would pay the sum due directly and in cash not later than one month after the declaration of an armistice between Great Britain and Germany or earlier if her account at the National Provincial Bank had been released prior to the armistice. She added an undertaking that the 2,000*l.* should bear interest at the rate of 5 per cent. per annum after becoming due.

The appellant's name nowhere appeared in these documents. In fact a blank space was left wherever a payee or obligee's name was due to appear, this precaution being presumably taken for reasons of security. But it was beyond doubt on the evidence available that on June 10, 1944, the respondent, a British subject resident in Monaco, borrowed 320,000 French francs in Monaco from the plaintiff, a Dutch subject also resident there at that date, on an undertaking to repay the money in sterling in London at the rate of 160 francs to the £ as soon as, but not before, the law of this country would allow such a payment to be made.

This transaction was repeated in all its essential features on two further occasions. On June 15, 1944, and again on July 8, 1944, the appellant paid over to the respondent a further sum of 320,000 French francs, and on each occasion secured a further set of documents to the purport already set out. Thus the respondent assumed a liability to pay in London the sum of 6,000*l.* in all, no part of which she subsequently made available. Nor, it appeared, did she have at the date of her promise or at any time since any account at the branch of the National Provincial Bank upon which her cheques were drawn.

In this action the appellant's statement of claim endorsed on the writ was as follows: " The plaintiff's claim against " the defendant is for the sum of 6,000*l.* money lent by the " plaintiff to the defendant . . . . and interest thereon from " June 9, 1945, at 5 per cent. per annum.

" Particulars :—

" June 10, 1944	..	2,000*l.*
" June 15, 1944	..	2,000*l.*
" July 8, 1944	..	2,000*l.*

" *On each of the said dates the plaintiff lent to the defendant* " *320,000 francs which the defendant agreed to repay to the*

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"*plaintiff in sterling at the agreed rate of 160 francs to the pound.* "The defendant *further* agreed to pay interest on the said "loans at 5 per cent. per annum until payment as from one "month after the termination of hostilities between Great "Britain and Germany and the plaintiff further claims "interest at the rate of 5 per cent. per annum from June 9, "1945, until payment or judgment." (The words in italics were added by amendment.) By further and better particulars it was stated that the contracts were oral and were confirmed in writing by the three documents dated June 10, June 15 and July 8, 1944.

To this claim the respondent delivered a defence which raised a number of separate grounds of defence, among them a plea based on reg. 2 of the Defence (Finance) Regulations, 1939, that "the alleged loans . . . . and the alleged agree-"ments . . . . were . . . . contrary to reg. 2 . . . . and "were and are . . . . illegal and invalid."

The appellant gave evidence on his own behalf; the respondent was not called to give evidence but two affidavits sworn by her as to the facts of her place of residence were admitted by agreement.

Croom-Johnson J. held that the transactions were not within the terms of reg. 2, and that as transactions of loan they were enforceable against the respondent. By an order of the Court of Appeal dated December 13, 1948, it was ordered that his judgment should be wholly set aside and that judgment should be entered for the respondent. The appellant appealed to the House of Lords.

Sir David Maxwell Fyfe K.C. and *Benjamin Goodman* for the appellant (the lender). Regulation 2 of the Defence (Finance) Regulations, 1939, as amended by St. R. & O. 1940, No. 1484, is no longer in force, having been revoked as from October 1, 1947, by the Exchange Control (Transitional Provisions) Order, 1947 (St. R. & O. 1947, No. 2052): see Exchange Control Act, 1947, s. 1. The regulation cannot be read literally, and accordingly some qualification must be put on its terms to limit them, in order to make it read sensibly and to avoid absurdity. It does not bear on this transaction. The word "person" in reg. 2 (1) does not apply to a British subject resident abroad, and, in particular, to one who is in enemy-occupied territory, on the other side of the line of war. In dealing with trading with the enemy the principles always applied to commercial transactions and civil rights have depended on residence and not on nationality. The courts should stand by that. The principle is clearly stated in *Porter* v. *Freudenburg* (1). See also *Sovfracht* (*V/O*) v. *Van Udens Scheepvaart en Agentuur Maatschappij* (*N. V. Gebr*) (2) in the House of Lords and in the Court of Appeal (3). In the Trading with the Enemy Act, 1939, s. 2, there is a definition of the expression "enemy." The literal application of the regulation now in question would result in a departure from settled principle. It would render guilty of an offence punishable by heavy penalties anyone who performed any of the actions enumerated by Lord Greene M.R. in the *Sovfracht* case (3). To construe the regulation as applying extraterritorially would lead to manifest and gross absurdity. If an intraterritorial construction can be given to a piece of legislation it should be given; unless one is obliged to do so, it should not be construed extraterritorially, for the reason that it cannot be enforced extraterritorially. When a criminal offence is created it is material to consider how it can be enforced. Thus, in the case of this regulation, if some inroad must be made upon its literal meaning, it should, as far as possible, be construed intraterritorially. On the point of the construction of the regulation the matter is put very succinctly in the relevant introductory note in Butterworth's Emergency Legislation Service. The circumstances of this case might have been reproduced in any German or Austrian town, and the absurdity of the respondent's construction of reg. 2 is manifest from the case of a British subject who has lived long in a place which becomes enemy territory. Such a person who obtained an every-day loan from a friend or from his banker against a promise to repay in the same currency could not, by this harmless transaction, be guilty of a criminal offence under reg. 2. Further, the transaction now in question was not a buying or borrowing of foreign currency within the meaning of reg. 2. As set out in the statement of claim, repayment was to be in sterling and that represents the legal analysis of the transaction. The loan was one of sterling with sterling as the yardstick by which it was calculated. Alternatively, the expression "foreign currency" in reg. 2 does not include the currency of a country beyond the line of war in which a

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(1) [1915] 1 K. B. 857, 868.
(2) [1943] A. C. 203, 229.
(3) [1942] 1 K. B. 222, 226.

British subject is resident. The definition in reg. 10 is subject to the limitation "unless the context otherwise requires" and in reg. 2 (1.) the prohibition against buying or borrowing foreign currency is subject to two savings, (*a*) the case of doing so with Treasury consent, and (*b*) the case of doing so from an authorized dealer. The regulations cannot have applied in a place where there was no possibility of implementing the two savings.

In any event, the appellant is entitled to recover the sum as money had and received as on an obligation implied by law, on the principle formulated by Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ld.* (1), even though the loan was contrary to reg. 2 and the agreement itself was unenforceable in an English court by reason of the prohibition contained in it. The scope of a penal prohibition cannot be enlarged by looking at the mischief at which it is aimed. There is no reason why the court should refuse to order repayment of a sum obtained from the appellant by the respondent on the understanding that the parties were acting legally and on the unfair pretence that the respondent was in a position to repay it. In the result the appellant got nothing out of the transaction and only lost the money he had lent. In those circumstances he must have a right of action. The consideration has wholly failed. The respondent ought not in conscience to retain the money, and that consideration is sufficient to support an action for money had and received. The appellant relies on the facts found by Croom-Johnson J., who held that the parties were not in pari delicto. If the contract was good according to the lex loci, the loan was not bad: see *Santos* v. *Illidge* (2). In the present case the lex loci was the law of Monaco, and that law permitted the loan, so that the lender, who was a foreigner, was not committing any illegality. The plaintiff can recover on the basis of money had and received: see *Greville* v. *Da Costa* (3).

Benjamin Goodman following. These regulations do not affect innocent transactions. In this case there is no creation of a sterling credit. The respondent was presumably domiciled abroad and merely to live she would have to borrow from a friend or a banker against a promise to repay. She was in a position analogous to that of an escaping prisoner of war who borrowed money, promising to repay it when he made good his escape. In any event the effect of the regulations was not to invalidate the transactions but only to subject the persons contravening them to penalties: see *Spink (Bournemouth) Ld.* v. *Spink* (1).

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(1) [1943] A. C. 32, 61.

(2) (1860) 8 C. B. (N. S.) 861, 873, 867–8.

(3) (1797) Peake Add. Cas. 113.

Salmon K.C. and *Stenham* for the respondent (the borrower). There could not be plainer words than those of the Emergency Powers (Defence) Act, 1939, s. 3, sub-s. 1, to give extra-territorial effect to these regulations. This is to be deduced from the section itself, apart from the side-note. It would be an odd result if the regulations did not apply on the other side of the line of war. If that were so then a transaction by the respondent in the morning, before the enemy occupation of Monaco, would be illegal, while a transaction in the evening, after it, would be legal. The mischief aimed at is the weakening of sterling. The net is cast very wide and it may catch fish for which the legislature were not fishing. It is unfortunate that cases of genuine necessity should be technically within the regulations but it is of greater importance that the cases aimed at should not escape and in practice no great harm would be done. The fact that a particular country is occupied by the enemy does not make the mischief less and might make it greater. It is important for a country at war to prevent the enemy from securing its currency, and if these regulations did not apply to enemy-occupied territory that danger would be increased. It was argued that this was not a borrowing of foreign currency, but, on the appellant's pleadings, this cannot be maintained. In the case of a transaction by which English currency is promised to be paid in exchange for foreign currency, a line cannot be drawn to exclude British subjects in enemy territory. The line of war is a consideration germane to questions of trading with the enemy, but not to questions of currency transactions. The fact that the British subject in enemy territory cannot physically apply to the Treasury for permission to buy foreign currency under the terms of reg. 2 (1.) cannot render the regulation inapplicable. Such a construction might lead to a greater mischief. There is nothing in the regulations to suggest that they were not intended to apply to such a transaction as this.

As to the question of "unjust enrichment," this was not pleaded and it was in the face of objection by counsel for the respondent that it was allowed to be argued in the courts below.

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(1) [1936] Ch. 544, 549.

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LORD SIMONDS intimated that their Lordships were of opinion that the issue of "unjust enrichment," which was not pleaded, should not have been raised in the Court of Appeal and, further, that there was no material on which they could find in favour of the appellant on that issue.

Stenham following. An illustration of the mischief of construing the regulations in accordance with the appellant's argument would be the case of a treacherous prisoner of war released on parole, who would then be able lawfully to dispose of unlimited quantities of currency.

Sir David Maxwell Fyfe K.C. in reply. It was a condition of this agreement that repayment was not to take place until the law permitted, that is, after the end of the war. There can be no objection to a transaction that may profit the enemy after peace is restored. Statutes are often construed in such a way as to give them reasonable effect and the limitations suggested by the appellant would comply with common sense and would do justice.

Their Lordships took time for consideration.

Mar. 21. LORD SIMONDS. My Lords, I have had the privilege of reading the opinion which my noble and learned friend, Lord Radcliffe, is about to deliver, and I agree so fully in his reasoning and conclusions that I do not propose to add anything upon the main question in the appeal, namely, what was the effect of the Defence (Finance) Regulations, 1939, upon the transaction under review?

It is only on another aspect of the case that I wish to make some observations. The appellant's claim against the respondent as stated in his statement of claim was simple and unequivocal. It was for the sum of 6,000*l.* lent by him to her with interest from June 9, 1945, at the rate of 5 per cent. per annum. Particulars of the sum of 6,000*l.* were given, by which it was alleged that three several sums of 2,000*l.* were lent on June 10, June 15 and July 8, 1944. By amendment it was alleged that on each of these dates the appellant lent to the respondent 320,000 francs which she agreed to repay to him in sterling at the agreed rate of 160 francs to the pound, and it was further alleged that she agreed to pay interest on the said loans at 5 per cent. per annum with payment as from one month after the termination of hostilities between Great Britain and Germany.

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This, the only issue raised upon the pleadings, is that with which alone the court was properly concerned. But it appears that both before the learned trial judge and before the Court of Appeal the appellant was, despite the objection of counsel for the respondent, allowed to raise a very different alternative issue, namely, that, if the appellant could not recover under his claims as pleaded, then he could recover against the respondent upon the footing that he had made to her a payment for which the consideration wholly failed: therefore he was entitled to recover the money paid to her as money had and received, and for this purpose the so-called principle of "unjust enrichment" was invoked.

To me, my Lords, it appears that such a procedure cannot be justified. Had an amendment been duly made and the issue properly raised it would have been a very different matter. Then the respondent would have been in a position in her turn to amend her defence and plead to the new issue, and it is at least possible that her advisers would have found material on which they could rely to displace such new case as the appellant might make. I do not think I am going too far if I say that substantial injustice is likely to be done if such a departure is made from the ordinary course of practice and pleading. I should, therefore, had I been fully aware at the outset of all the circumstances, have at an early stage moved your Lordships that counsel for the appellant should not be allowed to raise this issue upon appeal. It happened, however, that it was only at the conclusion of the appellant's argument, that I, in common with the rest of your Lordships, fully appreciated how serious had been the departure from any issue pleaded, how different the relief claimed—320,000 francs to be converted into £ sterling at the proper rate of exchange, which assuredly would not be 160 to the £—from that appearing on the face of the writ, and how scanty, through no fault of the respondent, were the materials on which a judgment on this issue must be formed. But my belated appreciation of the situation had this advantage at least, that I had heard all that was to be said on the application of the doctrine of "unjust enrichment" to the present case and saw no ground for thinking that the Court of Appeal had come to a wrong conclusion on it. I had therefore the less reluctance in suggesting to your Lordships that counsel for the respondent should not be called on to meet a case which should never have been allowed to be raised.

In my opinion the appeal should be dismissed with costs.

Lord Normand. My Lords, I have had the advantage of reading in print the opinion of my noble and learned friend Lord Radcliffe. I find myself in complete agreement with all that he has said and I will not detain your Lordships by adding anything of my own. I agree also with my noble and learned friend on the woolsack on the impropriety of introducing a question of unjust enrichment without specific notice in the pleadings.

Lord Morton of Henryton. My Lords, I agree with my noble and learned friend on the woolsack that the issue of "unjust enrichment" was not open to the appellant in these proceedings, and I have formed no opinion upon this issue. Upon all other issues, I agree entirely with the opinion which is about to be delivered by my noble and learned friend Lord Radcliffe. The result is that the respondent, Mrs. Weil, cannot be compelled, in these proceedings, to repay to the appellant the sums which he lent to her, in response to her entreaties, in order to save her son, a Jew, from a German concentration camp. The appeal must be dismissed.

Lord MacDermott. My Lords, I am of opinion that this appeal must fail on the grounds that reg. 2 of the Defence (Finance) Regulations, 1939, forbade the respondent to borrow French francs from the appellant as she did, and that the courts of this country cannot uphold the appellant's claim to recover on foot of a promise to make repayment in respect of the sum so borrowed. I need not detail my reasons for these views. I have had the advantage of reading in print the opinion of my noble and learned friend Lord Radcliffe and I agree so completely with his reasoning and conclusions on these matters that there is nothing I can usefully add regarding them.

I express no view, one way or the other, as to whether the appellant would be entitled to relief had he sued on some different basis, such as "unjust enrichment" or deceit. The pleadings do not raise any issue of the kind and amendment at this late stage is out of the question, if only because it is possible that further evidence, relevant thereto, might have been adduced by the respondent had such issue been raised before the trial.

LORD RADCLIFFE stated the facts and continued: My Lords, the action out of which the present appeal arises represents the appellant's endeavour to obtain from the courts of this country a judgment against the respondent for the sum of 6,000*l*. I think that this endeavour must fail because I am satisfied that the respondent broke the law of this country and committed an offence when she borrowed these sums in francs from the appellant. If that is so, he can get no relief in respect of that transaction from an English court, and it would afford no material assistance to him if I were to express my sympathy with him in the predicament in which he is placed or my distaste for the attitude which the respondent appears to have taken up against her benefactor. But before I come to the legal issues involved it is necessary to say something of the course of the proceedings in the courts below.

The endorsement on the appellant's writ stated explicitly that he was claiming from the respondent the sum of 6,000*l*. which he had lent to her in francs and which she had promised to repay in sterling. By further particulars he made it plain that he was asserting the existence of an oral contract to this effect which had been confirmed in writing by the several documents that I have noticed above. To this claim the respondent delivered a defence which raised a number of separate grounds of defence, among them a plea that by virtue of reg. 2 of the Defence (Finance) Regulations, 1939, the loans to her and the alleged agreements relating to them were contrary to the regulation and were accordingly invalid and illegal. On these pleadings the action came to trial. The appellant was called as a witness and gave evidence on his own behalf: the respondent was not called to give evidence but two affidavits sworn by her as to the facts of her place of residence were admitted by agreement.

The trial judge, after considering and rejecting various of the respondent's grounds of defence for reasons which are not now material, since those grounds were abandoned by her counsel when the case came to the Court of Appeal, proceeded to consider the bearing of the Defence (Finance) Regulations on the case. The regulations to which he referred were regs. 2, 3 (*a*) and 3 (*c*). As to the first two, he expressed the view that on the facts found by him the loan transactions were not within their terms. I have not been able to extract

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from his judgment with any certainty what were the considerations that led him to this view, but I think that he was influenced partly by what he regarded as the practical difficulty of the Treasury in war time authorizing any transaction between two persons resident in Monaco and partly by his finding that the transactions were in truth transactions of loan and not in any sense exchange transactions or transactions in currency, direct or indirect. Since I have come to the conclusion that reg. 2 is decisive of this case, I need not refer to the learned judge's interpretation of reg. 3 (*c*), which, also, he held not to apply. So holding, he entered judgment for the appellant for 6,000*l.* with costs.

It will be convenient at this point to set out in full the contents of reg. 2 (I.) as it stood in June, 1944. It ran as follows: "(I.) Except with permission granted by or on behalf of the "Treasury, no person other than an authorized dealer shall "buy or borrow any foreign currency or any gold from, or "lend or sell any foreign currency or any gold to, any person. "The expression 'authorized dealer' means, in relation to "any transaction in respect of gold, a person authorized by "or on behalf of the Treasury to deal in gold, or, in relation "to any transaction in respect of foreign currency, a person "authorized by or on behalf of the Treasury to deal in foreign "currency." This regulation the Court of Appeal have unanimously held to apply to the transactions which are here in question and to produce the result that the appellant cannot recover the sterling debt arising from the loan agreement. Accordingly, by the order of the Court of Appeal dated December 13, 1948, it was ordered that the judgment of the trial judge should be wholly set aside and that judgment should be entered for the respondent. It is from that order that appeal is now taken to your Lordships' House.

My Lords, it would seem to follow that if the appellant is to succeed he must displace the conclusion that reg. 2 applies to his case. That is a simple issue, even if its solution gives rise to some difficulty. The Court of Appeal did not find it necessary to consider any of the respondent's other grounds of defence, of which the only one that was maintained before them appears to have been based on reg. 3 (*c*). And, of course, had your Lordships not been in agreement with the Court of Appeal that reg. 2 does apply here, it would have been necessary to consider the bearing of this reg. 3 (*c*). The appellant's counsel did indeed devote a large portion of his argument to the submission that reg. 2, when rightly understood, did not extend so far as to bear upon this transaction. I will explain in a moment why I do not agree with that submission, but, before I do so, I must notice an alternative argument that was addressed to us on behalf of the appellant.

The alternative argument took this shape. Let it be assumed, it was said, that reg. 2 did forbid the respondent to obtain this loan and that accordingly the loan agreement itself cannot be enforced in an English court. Nevertheless the fact remains that she obtained 960,000 francs and the appellant in the result got nothing at all out of the transaction except the loss of the money that he had advanced. Surely, it was urged, in circumstances such as these a right of action must arise in the appellant on the ground of the unjust enrichment of the respondent. I do not propose to give any detailed attention to the meaning of the phrase "unjust enrichment" as a principle of liability, since I think that such a claim, however phrased, must fail in this case; but I take it to be a less technical, if more dignified, description of the count for money had and received to a plaintiff's use which has long been an established cause of action under our system of law.

It is, I think, plain that no such claim was open to the appellant on the pleadings in the action. His whole case was confined to an enforcement of the terms of the loan agreement. Moreover, if his rights were to be no higher than a right to get his money back, I do not see how he could have looked for a judgment in sterling of 6,000*l.*, since the contractual rate of 160 francs to the 1*l.* was much more favourable to him than the rate ruling at the date in 1948 when the action was tried. But there is no doubt that in both the courts below the appellant did in fact conduct an argument to the effect that he was entitled to judgment by virtue of the principle of unjust enrichment without being called on either to abandon the argument or properly to define the issue by amendment of his pleading. The trial judge refers to such a claim in his judgment, but he did not decide it, since he was in favour of the appellant on his main grounds: the Court of Appeal considered it as an alternative contention and rejected it on its merits. Your Lordships were informed that this plea was not entertained by the Court of Appeal without a protest by counsel on behalf of the respondent to the effect that it was not open on the pleadings, a protest which in the result

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must be treated as having been overruled. I am not clear whether an objection as definite was taken before the trial judge, but at least no suggestion was made to us that the respondent's counsel had at any stage consented to this issue being decided on the pleadings as they stood: and that perhaps is the only thing that matters.

The course that has been taken of allowing this plea to be entertained without the issue having been properly raised at the trial might have placed your Lordships in a serious difficulty. For it would, I think, have been impossible to allow the appeal to succeed on this ground with any confidence that the respondent had been given the opportunity to which she was entitled of placing before the court all the facts that might be relevant to the determination of the issue. I am not unaware that the trial judge made findings to the effect that the respondent had deliberately misled the appellant as to the existence of her alleged banking account in London and that he had no knowledge as to the use to which she had put the moneys that she obtained from him. There is no reason whatsoever to suppose that these findings represented other than the true facts of the case: but the fact remains that without the issue of unjust enrichment fairly joined between the parties no one can be certain that the respondent might not have given some evidence or the appellant made some answer in cross-examination that would have had a material bearing on the point. In particular it would have been relevant to know how much, if anything, either of the parties knew of the Defence (Finance) Regulations which had been made by this country and whether either of them knew more than the other.

But, my Lords, I think that this difficulty disappears in the case before you when it is recalled that a further examination of the facts, while it might conceivably have produced material that would have aided the respondent, could not well have improved the position of the appellant. His counsel were content to base his claim on the facts as found by the trial judge, which included his holding that the parties must not be treated as in pari delicto: assuming, of course, that some offence against our Defence Regulations was committed by the respondent. If, even on the basis of those facts, the appellant's claim fails, it becomes unnecessary to consider what course of action would have been appropriate had a more favourable view of its merits commended itself to your Lordships.

For my part I agree with all that was said by Tucker L.J. in the Court of Appeal on this point. If reg. 2 did extend to this transaction it forbade the very act of borrowing, not merely the contractual promise to repay. The act itself being forbidden, I do not think that it can be a source of civil rights in the courts of this country. It is very well to say that the respondent ought not in conscience to retain this money and that that consideration is enough to found an action for money had and received. But there are two answers to this. Firstly, when the transaction by which the money has reached the respondent is actually an offence by our laws, the matter passes beyond the field in which the requirements of the individual conscience are the determining consideration. Secondly, an action in this country cannot by its very nature lead to a return of what was borrowed. Our courts are not being asked, and could not be asked, to make a personal order on the respondent to return to the appellant the francs that he handed to her. What is sought is a judgment in sterling. After all, we must not forget the realities of the matter. It is an accident of circumstance that at the time of the trial the franc rate may have been less favourable to the appellant than 160 to the £. Suppose it had stood at the contractual rate. Then, if this claim based on unjust enrichment were a valid one, the court would be enforcing on the respondent just the exchange and just the liability, without her promise, which the Defence Regulation has said that she is not to undertake by her promise. A court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it. I would borrow the words which Lord Sumner used in *Sinclair* v. *Brougham* (1): "The law cannot "de jure impute promises to repay, whether for money had "and received or otherwise, which, if made de facto, it would "inexorably avoid." His principle is surely right whether the action for money had and received does or does not depend on an imputed promise to pay.

I think, then, that the Court of Appeal were right in saying that if reg. 2 applied to the case the appellant's action must fail. Now, that this operation was a borrowing of foreign currency within the meaning of the regulation seems to me

(1) [1914] A. C. 398, 452.

inescapable. "Foreign currency" is defined by reg. 10 as meaning any currency other than sterling, unless the context otherwise requires; and here there is nothing in the context that permits, let alone requires, another meaning. Any person subject to the regulation who receives notes of a currency other than sterling on an undertaking to repay what he receives borrows foreign currency. What else can one say of it? One may speculate whether the makers of this regulation may have had in mind some more limited and specialized meaning for the words, when they spoke here of borrowing and lending currency; but in truth there is no material upon which to feed the speculation and your Lordships are bound to treat these words as meaning no less than what they so plainly say. The range of what they prohibit, so understood, is indeed exceedingly wide, and it is this very width that lends plausibility to the suggestion that there must be implied some qualification either of the class of persons affected or of the kind of transaction that is brought under control. Two instances have been used in argument to illustrate what is said to be the inacceptable absurdity of reading the regulation according to its literal meaning. There is the case of the escaping prisoner of war who borrows some money in the country through which he passes, promising to make it good if he can make good his escape. And there is the case of the British subject resident in a foreign country who raises some every-day loan from a friend or, perhaps, his banker there against his promise to repay in the same currency. Can it be thought that such harmless transactions were intended to be made criminal offences by this regulation?

For my part, I think that the escaping prisoner of war can be left out of consideration. His would have been a wholly exceptional case and would have been so treated: it would be quite unreasonable to base any particular construction of this general regulation on its circumstances. The British subject resident abroad presents more difficulty and does legitimately raise the query whether it can be right to interpret the regulation as governing his merely local transactions. But I think that it must be so interpreted. Section 3, sub-s. 1, of the Emergency Powers (Defence) Act, 1939, makes it imperative that Defence Regulations should be construed as applying to all British subjects, with certain immaterial exceptions, unless a contrary intention appears from the regulation itself. It is impossible to extract any such contrary intention from this regulation. The references which it contains to the Treasury's dispensing power and to the permitted operations of dealers authorized by the Treasury appear to me to be neither here nor there. Certainly they are quite insufficient to justify a construction more limited than the Emergency Powers (Defence) Act presumptively enjoins. And here I would add that when a regulation contains a general dispensing power such as the power that is given to the Treasury by reg. 2 it is very difficult to press to a result any argument for a limited interpretation which is based on the absurdity of its literal construction.

The particular qualification for which the appellant's counsel contended amounted to asking your Lordships to introduce an implied exception for British subjects who found themselves for the time being in enemy territory or territory which the enemy has overrun or occupied. I am ready to assume that Monaco could be so characterized at the material date. But I mean no disrespect to all that was urged on behalf of the appellant in support of this exception if I say that I can see no indication that would warrant your Lordships in putting such a construction on this regulation. If we did, we should be making a new regulation, not interpreting an existing one. Nor, stated as a general exception in favour of British subjects behind the enemy line, does it commend itself to me as a very probable feature of war-time legislation. Finally, the circumstance that the repayment in London was not to take place until the law permitted appears to me irrelevant, since it is the actual obtaining of the loan that the law forbids.

There is only one further matter that I wish to notice before I conclude. Fully as I agree with the Court of Appeal's view that reg. 2 prohibited this borrowing and therefore renders the appellant's claim for repayment unmaintainable, I do not find it possible to base my view either on the circumstance that this transaction was an exchange of francs for sterling, or on the fact, if it be a fact, that the proper law of this contract was the law of England. Indeed, it seems to me an unmaintainable proposition that if a British subject who is within the ban carries out such a transaction in foreign currency as the regulation describes, he commits or does not commit an offence according to whether the proper law of the transaction is English or foreign. These Defence Regulations were concerned with prohibiting certain acts, under

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the sanction of severe penalties and their interpretation cannot be assisted by considering in what circumstances the rules of private international law would uphold or reject contracts arising from those acts. I think that both the sterling element and the proper law factor are really irrelevant. I think so because I can find no warrant in the regulation itself for the assumption that it was specially designed for the support or the defence of sterling. Other regulations are, no doubt, directed specifically to this and, appropriately, base their provisions on distinctions between persons resident inside and persons resident outside the United Kingdom or the sterling area, as the case may be, and payments made to such persons. But reg. 2 says nothing of this. One can deduce from what it says no more than that it intended, just so far as it could, to restrict all dealings in foreign currency and gold to a group of dealers authorized by the Treasury. There were obvious advantages in this, but there is no warrant for supposing that the British Government was interested only in dealings in which sterling was involved. There was the currency of our allies to be considered and, for that matter, there was the currency of our enemies, against whom the Government had organized a Ministry of Economic Warfare. If it be said that, unless there is some implied limitation of the regulation to sterling transactions, it struck blindly, and perhaps needlessly, at all sorts of people and operations, I can see the force of the criticism, but I do not think that it alters the meaning of the words or should lead your Lordships to forget that in August, 1940, when the regulation first assumed its present amplitude, the tide of war itself was beating blindly upon many innocent people.

Appeal dismissed.

Solicitors: *William Charles Crocker; Pettiver and Pearkes.*

MOHINDAR SINGH AND ANOTHER . . APPELLANTS ;

AND

THE KING . . . . . . RESPONDENT.

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Mar. 13.

ON APPEAL FROM THE HIGH COURT OF THE COLONY OF SINGAPORE.

Singapore—Criminal law—Sentence—Adequacy—Appeal by Public Prosecutor—Competency—" Error in law or in fact "—Revisional jurisdiction—Straits Settlements Criminal Procedure Code, 1910 (*as amended by Or. No. XIII of* 1938), *s.* 302.

The Public Prosecutor (or his deputy) is a " person " within the meaning of, and having such rights of appeal as are conferred by, s. 302 of the Straits Settlements Criminal Procedure Code, 1910, as amended to 1938, which provides that " . . . . any " person who is dissatisfied with any judgment, sentence or order " pronounced by any District Court . . . . in a criminal case " . . . . may prefer an appeal to the High Court against such " judgment, sentence or order in respect of any error in law or " in fact . . . ." The Deputy Public Prosecutor therefore has a right of appeal to the High Court under that section against sentences passed by the District Court. *Public Prosecutor* v. *Rudguard* (1938) F. M. S. L. R. 215, referred to.

An appeal against sentence must, however, be in respect of an " error in law or in fact." That phrase, interpreted in its technical sense, has sufficient content when applied to the case of sentences—e.g., there will be an error of law if the sentence imposed is greater or less than the law permits or requires, and an error of fact when the judge in imposing a sentence has been misled by some error of fact. An exercise of discretion which errs only on the side of leniency or severity cannot on that account alone be said to involve error either in law or in fact. The Deputy Public Prosecutor therefore could not maintain an appeal to the High Court against the sentences passed by the District Court on the appellants on the single ground that they were inadequate, and it was on that ground alone that the High Court on appeal had increased the sentences by adding terms of imprisonment. The appeal by the Deputy Public Prosecutor to the High Court was therefore not competent, and that court had no jurisdiction to entertain it.

While it might be true that it was within the jurisdiction of the High Court to exercise its revisional jurisdiction in the matter of increasing sentences, the discretion under the revision sections of the Code was not in fact exercised in this case, and it would be without precedent for the Board to treat a discretionary power as having been exercised in order to support a decision made without reference to the power and without there having been any intention in the court to exercise it. Want of jurisdiction was too serious a matter to be treated in so casual a way. Further, on the facts of the case it would not be right to dismiss the appeal on the assumption that the High Court could clearly have done in revision what it was not competent to it to do on appeal, namely, to increase a sentence without there having been any error in law or in fact.

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*Present : LORD GREENE, LORD SIMONDS and LORD MORTON OF HENRYTON.

Judgment of the High Court reversed.

Appeal (No. 37 of 1949), by special leave, from a judgment of the High Court of the Colony of Singapore (June 1, 1949) which enhanced the sentences passed on the appellants by the District Judge of the First District Court on their conviction on April 11, 1949, of offences against the Prevention of Corruption Ordinance, 1937.

The following statement of the facts and statutory provisions is taken from the judgment of the Judicial Committee. The appellants had been convicted in the First District Court of offences against the Prevention of Corruption Ordinance (No. 41 of 1937). The first appellant, Mohindar Singh, was sentenced to fines amounting to $3,000 and $10 (he having been convicted on two charges), and the second appellant, Mohan Singh, was sentenced to a fine of $1,000. The sum of $2,000 given by the second appellant as a bribe was ordered to be confiscated. The Deputy Public Prosecutor appealed to the High Court on the ground that those sentences were inadequate, and by its order the High Court (Murray-Aynsley C.J.) increased the sentences by adding terms of rigorous imprisonment, 18 months in the case of Mohindar Singh and 12 months in the case of Mohan Singh. Neither of the appellants had appealed against either conviction or sentence, and at the hearing in the High Court no objection to its jurisdiction to entertain an appeal by the Public Prosecutor or his deputy or to increase the sentences was taken. By the Order in Council dated November 25, 1949, granting special leave the appeal was limited to the question whether the appeal by the prosecution was incompetent and whether the Appellate Court had jurisdiction to entertain such appeal or to make any order thereon other than an order of rejection thereof.

The appeal raised questions of importance for the administration of criminal justice in the colony. They might be summarized as follows: (1.) Had the prosecution, under the Criminal Procedure Code in force, any right of appeal against sentence? (2.) If so, were the grounds of appeal adequate to support the appeal? In addition to those two points raised on behalf of the appellants, a further point was taken on behalf of the respondent, namely, that even on the assumption that the appellants succeeded on either of their two points the appeal should nevertheless be dismissed on the ground that in exercise of its powers of revision under the Code the High Court of its own motion had jurisdiction to increase the sentences, and that in any event no injustice had been done.

At the material time the Criminal Procedure Code in force was the Code of 1910 as amended. Under it rights of appeal were given in respect of "any judgment, sentence or order "pronounced by any District Court." The relevant sections might be summarized, or where necessary quoted, as follows:—

"296.—(1.) No appeal shall lie from a judgment, sentence "or order of a Criminal Court except as provided for by "this Code or by any other law for the time being in force."

(2.) No appeal is to lie in the case of certain minor offences.

"299. When an accused person has pleaded guilty and "been convicted by a District Court or Police Court on such "plea there shall be no appeal except as to the extent or "legality of the sentence.

"300. When an accused person has been acquitted by "a District Court or Police Court there shall be no appeal "except by the Public Prosecutor."

"302.—(1.) Except in any case to which s. 296 applies "any person who is dissatisfied with any judgment, sentence "or order pronounced by any District Court or Police Court "in a criminal case or matter to which he is a party may "prefer an appeal to the High Court against such judgment, "sentence or order in respect of any error in law or in "fact" . . . . by lodging a notice of appeal and paying a fee . . . .

(4.) The appellant must lodge a petition of appeal.

"(5.) Every petition of appeal shall state shortly the "substance of the judgment appealed against and shall "contain definite particulars of the points of law or of fact "in regard to which the court appealed from is alleged to "have erred."

(6.) The appellant may be required to give security for costs.

" (7.) In the case of an appeal by the Public Prosecutor " no fee shall be payable nor shall any security be required."

The powers of the court on an appeal were set out in ss. 310 to 316 which, so far as relevant, provided as follows :—

" 310. At the hearing of the appeal the court may, if it " considers there is no sufficient ground for interfering, " dismiss the appeal or may—

" (*a*) in an appeal from an order of acquittal, reverse " such order and direct that further inquiry shall be made " or that the accused shall be retried or committed for trial, " as the case may be, or find him guilty and pass sentence " upon him according to law ;

" (*b*) in an appeal from a conviction,

" (1.) reverse the finding and sentence and acquit " or discharge the accused or order him to be retried " by a court of competent jurisdiction or committed " for trial ; or

" (2.) alter the finding, maintaining the sentence, or, " with or without altering the finding, reduce or enhance " the sentence ; or

" (3.) with or without the reduction or enhancement " and with or without altering the finding, alter the " nature of the sentence ;

" (*c*) in an appeal from any other order, alter or reverse " such order."

(The words " or enhance " and " or enhancement " were first inserted in 1933.)

" 315. No judgment, sentence or order of a District " Court or Police Court shall be reversed or set aside unless " it is shown to the satisfaction of the High Court that " such judgment, sentence or order was either wrong in " law or against the weight of the evidence."

1950. Feb. 6, 7, 8. *Page K.C.* and *R. Parikh* for the appellants. The questions in this appeal are whether the Deputy Public Prosecutor had a right of appeal on the ground of inadequacy of sentence, and whether the High Court had jurisdiction to entertain such an appeal. Section 296 of the Criminal Procedure Code, 1910, as amended, confines the right of appeal under the Code to (*a*) cases for which provision is made by the Code, and (*b*) cases in which a right of appeal is given by some other law. Then s. 299 gives a right of appeal to the convicted person only, limited to the extent or legality of the sentence. The word "extent" refers to the amount, whether in terms of imprisonment of or fine, and not to the nature, of the sentence. Section 310 supports that view. There is no right of appeal where the sole ground taken, as in the present case, is the nature of the sentence. Coming to s. 302, it is submitted that the words "any person" do not include the Crown. The Crown is given the right of appeal under s. 300. The word "person" is not defined by the Code of 1910, but s. 2 incorporates the definition contained in s. 11 of the Penal Code, 1872, which enacts that "person" includes any company or association or body of persons whether incorporated or not. The words of the Interpretation Act of the Straits Settlements are for practical purposes the same. It is submitted that the meaning of "person" as regards the Penal Code must be confined to persons within the ordinary acceptation of the term, and it would be absurd if it were to be extended to include the Crown. It is an unqualified definition. Therefore the words "any person" in s. 302 cannot include the Crown. If that be wrong, then everywhere in the Penal Code "person" would include the Public Prosecutor, and that cannot be so: see, for example, s. 107. It must mean any individual and not somebody who does something by virtue of and in exercise of his office.

Next, the right of appeal under s. 302 is given to a person who is a party to the proceedings and who is dissatisfied with any judgment, sentence or order; and the right given is to appeal "in respect of any error in law or in fact." Again, those words also must be taken in their ordinary meaning; that is to say, they mean that it must be a question of law or of fact arising in the course of the trial. The position is correctly stated in Halsbury's Laws of England, 2nd ed., vol. 9, p. 254, s. 362. The words "any error in law or in fact" have no application to sentence, but only to an error in law or in fact arising in the course of the trial. This Procedure Code is modelled on the Indian Criminal Procedure Code, and it cannot have been the intention of the legislature that the question of an error in law or in fact had reference not only to a judgment—a conviction—but also to sentence. The corresponding section of the Indian Code is s. 418. The explanation to s. 418 was not adopted in the Straits Settlements Code, and so it does not cover the matter of sentence. A case admittedly against the appellants is *Public Prosecutor* v. *Rudguard* (1),

(1) (1938) F. M. S. L. R. 215.

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where it was held that "Public Prosecutor comes under the "description of 'any person.'" To turn to s. 310 of the Straits Settlements Code, in this Code there is a plain and obvious distinction drawn between what is reduction and enhancement and what is altering the nature of the sentence. In so far as s. 310 (*c*) concerns an appeal from sentence, it is an appeal under s. 299, because that is the only appeal which can lie from a sentence, except on the question of legality. "Extent" in s. 299 means the duration or amount. Section 302 gives a right of appeal only in one particular case, namely, where the sentence is an illegality outside s. 299. Here no error of fact is alleged--there is no challenge of any finding of fact--and the whole thing turns solely on the question of discretion.

One of the contentions raised by the Crown is that power could be taken by the High Court under s. 322 to enhance the sentence in the exercise of its revisional jurisdiction. It cannot be said that the words in s. 322 "or which otherwise "comes to its knowledge" can be intended to relate to a case where the Record comes to its knowledge otherwise than in due course of law. It cannot be said that the Record came to its knowledge by the institution of an appeal which the High Court had no power to entertain—assuming that the argument to that effect is right, because this contention only arises in the event of the appellants' being right on the first point. If the court does exercise these wide revisional powers it must do so consciously, it must intend to do so; and in the present case there is no indication whatever that the question of revision was raised or entertained by the appellants; and, finally, when it came to certifying this judgment and sentence, the High Court certified it under a section which was applicable to a certificate of appeal and not applicable to revision. [Reference was made to *In re Chunbidya* (1), *Kishan Singh* v. *King-Emperor* (2) and *Rex* v. *J. W. Lim* (3), and, on the question of grave and substantial injustice, to *Dillet's* case (4).]

Gahan for the respondent. Whatever difficulties there may be in construing this group of sections in the Straits Settlements Code, it is quite clear as a matter of construction that the words "any person" in s. 302, sub-s. 1, must include the Public Prosecutor. After "any person" has preferred an appeal by lodging a notice of appeal and paying an appeal fee he then becomes the appellant who is referred to in the subsequent series of sub-sections; and sub-s. 6 enacts that the District Court may in its discretion require the appellant to give security for costs. Then by sub-s. 7, "In the case "of an appeal by the Public Prosecutor no fee shall be payable "nor shall any security be required." The words "any "person" in sub-s. 1 must include the Public Prosecutor, otherwise there could be no point in the reference in sub-s. 7 to remitting the fee. Next, ss. 296, 299 and 300 are a series of prohibitions: they do not confer the right of appeal, but restrict it as set out in those sections. The right of appeal conferred by s. 302 is a right which includes cases excepted from the prohibition in ss. 299 and 300. Section 302 gives a general right, but the other two sections concern particular qualifications. Therefore, reading the group of sections as a whole, the general right is cut down to the extent that is specified in ss. 299 and 300. Throughout s. 302 the words "the appellant" mean, and mean only, the person who has complied with the requirements of sub-s. 1 and has preferred an appeal by doing the things there set out.

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(1) (1934) L. R. 62 I. A. 36.
(2) (1928) L. R. 55 I. A. 390.
(3) [1940] S. S. L. R. 236.
(4) (1887) 12 App. Cas. 459, 467.

The words "in respect of any error in law or in fact" are not intended to be restrictive, but are wide words making it clear that the right of appeal is not confined to questions of law, but that it is a comprehensive right which will cover any complaint either in law or in fact; and the grounds on which the appeal can be brought are therefore of the very widest nature. The words "in respect of any error in law or in fact" include the extent of the sentence. The intention of this Code is to allow any person who is dissatisfied with the sentence to appeal in respect of its extent—whether too severe or not sufficiently severe. The words "any error in law or in fact" include an appeal on the hearing of which the Court of Appeal can reduce or enhance the sentence; then the matter is being treated as coming within the scope of those words, if the sentence is unduly severe or unduly light. If ss. 299, 302 and 310 are read together that is a reasonable construction to give to the words. Section 418 of the Indian Criminal Procedure Code does help when its purpose is examined. "The alleged "severity of a sentence shall . . . . be deemed to be a matter "of law" in the explanation to s. 418 has no corresponding explanation in the Straits Settlements Code, because there is not the same restriction to an appeal on a matter of law only. Section 302 gives to the Crown a right of appeal against a sentence which it alleges to be inadequate, and s. 310 entitles the High Court to enhance a sentence when the appeal is against sentence only.

With regard to the sections relating to revision, when under s. 320 the High Court calls for the Record to satisfy itself as to the correctness, legality or propriety of the sentence, the intention is that it should do so with a view to remedying anything that is wrong, and, in giving the remedy, have recourse to the power contained in s. 310, the power which can be exercised on appeal. The submission therefore is that these powers contained in s. 310 are the powers appropriate to enable the court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order. As regards the power of revision as distinct from the power of appeal, no one suggested below in this case that the Public Prosecutor was not entitled to appeal, so the point as to revision was not taken. But there was no prejudice to the accused persons, because the whole case turned on the question whether or not the sentence ought to be enhanced. If the point of jurisdiction had been taken the Chief Justice would only have had to say that he could make the order under s. 322. Without any further step the revisional power could, and would, have been exercised, and there would have been no miscarriage of justice in this case by disregard of due process of law. The conditions for the exercise of jurisdiction were present, and all that the Chief Justice had to say was, " I do " this in revision." [Reference was made to *Kishan Singh* v. *King-Emperor* (1) ; *Rex* v. *Lim* (2) ; and *Public Prosecutor* v. *Rudguard* (3).] In exercise of its powers of revision the High Court had jurisdiction to enhance the sentences.

Page K.C. in reply. It is conceded by the respondent that the High Court throughout dealt with this case as an appeal ; it never at any stage entertained the matter in the exercise of its revisional jurisdiction. The only question here is whether the High Court had jurisdiction as an appellate court to pass this sentence. If it had not, it acted without jurisdiction, and that is to cut at the very root of the principles of justice : *Muhammad Nawaz* v. *King-Emperor* (4). It was said for the respondent that the words " any error in law or in fact " are

(1) L. R. 55 I. A. 390.
(2) [1940] S. S. L. R. 236.
(3) (1938) F. M. S. L. R. 215.
(4) (1941) L. R. 68 I. A. 126.

not to be given their ordinary meaning, but extend to objection to sentence. No question of fact can arise on a sentence, but only one of law.

March 13. The judgment of their Lordships was delivered by LORD GREENE, who stated the facts set out above and continued: Their Lordships regret that these questions as to the competency of the appeal to the High Court and that court's jurisdiction to entertain the appeal were not raised in the High Court, since they are deprived of the assistance which a consideration of them by that court would have afforded.

It is to be noted that the powers conferred by s. 310 are exercisable " at the hearing of the appeal " which, in their Lordships' view, means an " appeal " properly brought within the limits laid down by the earlier group of sections. But although the right of appeal itself and the powers exercisable by the court on an appeal are two different matters, yet the two sets of provisions must be read as a whole. It is scarcely to be supposed that there would be a lack of coincidence between what are two parts of one coherent scheme.

Their Lordships will now address themselves to a consideration of the two points submitted on behalf of the appellants. It is not in dispute that if the Public Prosecutor (or his deputy —no distinction is to be drawn between them) has a right of appeal in the present case it must be found in s. 302. That section confers the right of appeal there described on " any " person who is dissatisfied with any judgment, sentence or " order," etc. Mr. Page on behalf of the appellants maintained that the word " person " here does not include the Public Prosecutor. The Crown, he says, is the appellant and the Public Prosecutor merely represents the Crown. He refers to the definition provisions in the Code. They contain no specific definition of the word " person," but s. 2 incorporates the definition contained in s. 11 of the Penal Code of 1872, which provides that: " The word 'person' includes any " company or association or body of persons, whether " incorporated or not."

This definition, Mr. Page contended, is not apt to describe the Crown or the Public Prosecutor as representative of the Crown. On the other hand, the position and duties of the Attorney-General as Public Prosecutor are defined in c. 34 of the Criminal Procedure Code, and by s. 402, sub-s. 6, he and no other "person" is authorized to appear on behalf of the Crown in a criminal appeal. That he is recognized by the language of that Code as a "person" seems to their Lordships clear beyond dispute. He is referred to in s. 300 as one having a right of appeal in the case of an acquittal, and the language of the section is not so apt to confer a right not conferred elsewhere as it is to state an exception from a general prohibition against appeals where an accused person has been acquitted. This, in their Lordships' opinion, points strongly to the view that s. 302 confers on the Public Prosecutor the right of appeal which s. 300 thus preserves, and it can only do so if he is included in the word "person."

Further, sub-s. 7, by dispensing with the payment of a fee and the provision of security "in the case of an appeal by the "Public Prosecutor," is in the opinion of their Lordships a clear indication to the same effect. Mr. Page attempts to reconcile this sub-section with his proposition by suggesting that it refers not to a right of appeal given to the Public Prosecutor as a "person" within s. 302 but to the special right of appeal which he says is conferred on him eo nomine by s. 300. Their Lordships cannot accept this contention. The language of sub-s. 7, its position as a sub-section of s. 302, the facts that it is only by virtue of that section and not by virtue of anything in s. 300 that a fee and provision of security would be required, and that if the sub-section was only intended to refer to the single case of the appeal referred to in s. 300 it would naturally have been treated as a proviso to that section, satisfy their Lordships that the Public Prosecutor is a "person" having such rights of appeal as are conferred by s. 302. A similar view was taken by Terrell Ag. C.J. in a case under the corresponding provisions of the Criminal Procedure Code of the Federated Malay States: *Public Prosecutor* v. *Rudguard* (1).

The second of the two points taken on behalf of the appellants raises a more difficult question, namely, whether the Public Prosecutor can maintain an appeal against sentence on the single ground that it is inadequate. The contention of Mr. Page is that he cannot; that an appeal against sentence, like an appeal against "judgment or order," must be in respect of an "error in law or in fact"; and that inadequacy by itself is not sufficient. This argument is based on weighty considerations. They may be summarized sufficiently for present purposes somewhat as follows. The words "error "in law or in fact" refer to all three matters in relation to which an appeal may be brought, namely, "judgment, sentence "or order." The phrases "error in law" and "error in fact" embody two distinct classes of error, they are technical phrases in common use in the law and their meaning is not in doubt. Questions of "law" and questions of "fact" may be combined in a question of "mixed law and fact," but the judicial process of dealing with any of these three classes of question is different in kind from the judicial process of exercising a discretion conferred by law such as the discretion exercised in the selection of an appropriate sentence. The phrase interpreted in its technical sense has sufficient content when applied to the case of sentences. In imposing the sentence the court may have fallen into an error of law, e.g., if the sentence imposed is greater than the law permits or is less than the law requires. There is more difficulty in finding a content for the phrase "error in fact" when applied to sentence. Their Lordships are, however, of opinion that there is a sufficient content in that in imposing a sentence the judge may have been misled by some error of fact. In any event, an exercise of discretion which errs only on the side of leniency or severity cannot on that account alone be said to involve error either in law or in fact. It is conceded by Mr. Page that his interpretation restricts the right of appeal against sentence within narrow limits as regards both appeals by the convicted person himself and appeals by the Public Prosecutor: and also that it may lead to certain anomalous results.

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(1) (1938) F. M. S. L. R. 215.

The contrary argument derives its chief strength from the following considerations. To apply the phrase "error in law "or in fact" in the case of sentence in the manner suggested involves too technical a construction, which not only raises inconsistencies with other expressions in the relevant parts of the Code but leads to results so anomalous that the legislature cannot be supposed to have intended them. A striking inconsistency appears in s. 299, where the appeal referred to is "as to the extent or legality of the sentence." Section 302 is the only section by which an appeal is affirmatively "provided" within s. 296; and in s. 299 the appeal is not "provided" but is merely excepted from a general prohibition against appeals in the case of acquittal. The appeal referred to in s. 299 being therefore merely an example of the general right of appeal given by s. 302, that general right must be

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interpreted as covering the example. This must mean, it is said, that the phrase " error in law or in fact " is intended to be wide enough to cover the case of complaint against a sentence on the sole ground of " extent," i.e., that it is either excessively lenient or excessively severe. Moreover, it is said that a construction which treated s. 299 as giving by some sort of implication a special right of appeal would lead to the anomalous result that whereas an appeal as to " extent " of sentence under s. 299 not based on an alleged " error in " law or in fact " (whether it be an appeal by the person convicted or by the prosecution), would be open where the accused person had pleaded guilty, but where he had not so pleaded it would be limited to cases of " error in law or in " fact." It is further pointed out that under s. 310 the court has power where there is an appeal against conviction on its own motion to reduce or enhance the sentence so that in a case where the appeal is against conviction alone the power of the court is appearently a power at large.

Their Lordships have carefully considered these and other arguments. They fully appreciate the importance of avoiding, so far as the words and context fairly and reasonably permit, a construction which would lead to anomalous or patently unreasonable results. On the other hand, it is to be remembered that the desirability of avoiding such results must not be allowed to give to the language used a meaning which it cannot fairly and reasonably bear. If the legislature has used language which leads to such results it is for the court to give effect to it. The function of the court is interpretation, not legislation. The limits thus imposed on the court prevent the twisting of words and phrases into a sense that they cannot fairly and reasonably bear. Words having a technical meaning, words which are in effect words of art, are in essence more recalcitrant than words which do not possess that character. Where the legislature selects technical words to convey its meaning it is not in general to be supposed that it uses them in any but their technical sense or that their technical sense was unfamiliar to it.

In spite of the difficulties raised by apparent inconsistencies and suggested anomalies to which Mr. Gahan for the respondent rightly calls attention, their Lordships are of opinion that they are not sufficient to justify an interpretation of the words " error in law or in fact " in any but the natural sense that they convey to one familiar with legal phraseology. If there are anomalous consequences it is for the legislature, if it thinks fit, to correct what has resulted from an infelicitous choice of words. But the suggested anomalies do not appear to their Lordships to arise of necessity. For example, the word "extent" in s. 299 to which reference has been made, need not, as it seems to their Lordships, be construed as having a scope going beyond error in fact or law. It seems to them preferable to read s. 299 as a proviso to the general right of appeal given by s. 302, and to construe the word "extent" in a sense subordinate to and consistent with the technical phrase "error in law or in fact" rather than to twist the sense of that phrase to make it accord with a wider meaning of the word "extent." The main difficulty caused by the interpretation which their Lordships feel constrained to adopt appears to them to be in the very strict limitation which it imposes on the permissible grounds of appeal against sentence as regards both undue severity and undue leniency. But although their Lordships cannot avoid the suspicion that the intentions of the legislature may well have been more generous in these respects, they are forced to the conclusion that the language chosen to give effect to such intentions, if they existed, was not well chosen for the purpose.

Before leaving this branch of the case their Lordships desire to refer to two matters. Their view, they think, is reinforced by a consideration which was strongly urged by Mr. Page. By sub-s. 5 of s. 302, "every" petition of appeal must contain "definite particulars of the points of law or of fact" in regard to which error is alleged. This requirement is quite general, and it is impossible to exclude from it the case of an appeal against sentence. It is wide enough to cover an appeal "as to the extent" of the sentence which is contemplated by s. 299, and in their Lordships' view supports the limitation of the word "extent" which is suggested above. Now when the petition of appeal in this case is looked at there is, as Mr. Page convincingly points out, no particularization of any error either of law or of fact. The only ground of appeal mentioned in it is "That a sentence of fine only in the circumstances of this case is manifestly inadequate as a deterrent of similar offences." It is on the ground of its inadequacy alone that the High Court increased the sentence.

The other matter appears to their Lordships to be at any rate useful as an illustration of the argument. It is common ground that, subject to variations, the Criminal Procedure

Code of the Colony is, broadly speaking, based on the Indian Code. That Code has dealt with the difficulty that a sentence which is unimpeachable on the ground of error in law or in fact is a matter of discretion only and that if power to reduce it is to be given to an appellate court language apt for that purpose must be used. By s. 418 of that Code (Act V of 1898) it is provided that an "appeal may lie on a matter of fact "as well as a matter of law" except that in the case of a jury trial it is to lie on a matter of law only, and the "Explanation" says that "the alleged severity of a sentence shall for the "purposes of this section be deemed to be a matter of law." This appears to their Lordships to recognize that severity of sentence requires to be artificially brought within one or other of the two permitted categories, that of law being selected in order to cover the case of a jury trial. It is worthy of note that a similar device was adopted in the Code of Criminal Procedure of the Malay States (referred to above) where s. 307, sub-s. (i), gives a right of appeal "for any error in law "or in fact," and sub-s. (iv) adopts the language of the "Explanation" to s. 418 in the Indian Code.

Having regard to the conclusion at which they have arrived their Lordships do not find it necessary to discuss at length certain other matters which were mentioned in argument. They may, however, make one observation. Their Lordships find no practical difficulty in the fact that in the Code as it now stands the opening words of s. 302, sub-s. 1, drop the reference which had appeared in the earlier Code of 1900, to what are now ss. 299 and 300. Those two sections and s. 302 itself must be read together in any case, and reconciled with one another whatever may have led the legislature to drop the reference. Their Lordships see nothing in their having done so which can prevent s. 302 giving a general right of appeal or can exclude the Public Prosecutor from the operation of the section.

It remains to consider the argument in opposition to the appeal which is based on the powers of revision given to the High Court. Those powers are contained in ss. 317 to 324 of the Code. Sections 320 and 322 are the most important, and they provide as follows: "320.—(1.) The High Court "may call for and examine the record of any proceeding "before any inferior criminal court for the purpose of satisfying "itself as to the correctness, legality or propriety of any "finding, sentence or order recorded or passed and as to the "regularity of any proceedings of such inferior court . . . ." "322.—(1.) The High Court may in any case, the record of "the proceedings of which has been called for by itself or "which otherwise comes to its knowledge, in its discretion "exercise any of the powers conferred by ss. 305, 309, 310 and "311 of this Code. (2.) No order under this section shall be "made to the prejudice of the accused unless he has had an "opportunity of being heard either personally or by advocate "in his own defence. (3.) Nothing in this section shall be "deemed to authorize the High Court to convert a finding "of acquittal into one of conviction." Section 324 provides for certification by the High Court when it revises a case under these provisions. That section differs in language from s. 313 which deals with certification of the result of an appeal and was the section followed in the present case.

Mr. Gahan, for the respondent, submits that although the matter was brought before the Chief Justice by way of appeal and the certificate was a certificate under s. 313 the same order could have been made by the Chief Justice sitting in revision; that the reason why he did not so sit was that the petitioners had chosen not to raise the points now raised as to the competency of an appeal; that had those points been raised it would have been a simple matter of form for the Chief Justice to convert the sitting into a sitting in revision; that the only matter of substance discussed before the Chief Justice was whether or not the sentence ought to be increased; that the accused had the protection afforded by s. 322, sub-s. 2, in that they had the opportunity of being heard; and that in consequence no miscarriage of justice can be said to have taken place.

There appear to their Lordships to be a number of objections to this argument. It is based on the theory that the Board is entitled to treat the order appealed against as unobjectionable on the ground that it might have been validly made under a different section in exercise of a different statutory power. It was made on an appeal, and their Lordships have already held that the appeal was not competent. It would therefore be necessary in order to give effect to the argument to substitute a valid decision under a notional exercise of the discretionary power of revision which the High Court never purported to exercise at all. It may be quite true that it was within the jurisdiction of that court to exercise that jurisdiction. But it would be without precedent for the Board to treat a discretionary power as having been exercised in order to support a decision made without reference to the power and without there being any intention in the court to exercise it. It is no doubt true that for practical purposes it was a discretion to increase the sentence which the court in fact purported to exercise under the jurisdiction which it was (wrongly, as their Lordships have said) assuming on the appeal. But tempting though it might be to say that, after all, no harm has been done, their Lordships do not think that a sufficient ground for treating something as having been done which was not done. The discretion under the revision sections was not in fact exercised, and it would be in their Lordships' opinion dangerous to suppose that different arguments might not have been advanced if the court had been to the knowledge of the accused person acting in revision. Want of jurisdiction is, their Lordships think, too serious a matter to be treated in so casual a way. It has been spoken of in many judgments of the Board as one of the matters which lead to serious miscarriage of justice. Strict observance of the law as to jurisdiction is one of the fundamental rules in the administration of justice.

But their Lordships think that there is a special reason on the facts of this case for not accepting the argument advanced on behalf of the respondent. The Chief Justice did not have before him the arguments against the competence of the appeal which have been placed before their Lordships. In strictness it was for the court to dismiss the appeal as incompetent even though no objection on that ground was taken on behalf of the convicted persons. It is not surprising in the circumstances that this course was not taken, and their Lordships do not suggest any criticism in that regard. But if the point had been taken, and decided as it should have been decided, a further question would have arisen. If the Chief Justice had then proceeded to act under the revision sections it would have been open to the accused person to argue that under those sections it was equally necessary for the court to base any exercise of its powers (which are referentially imported from the appeal s. 310 into the revision s. 322) on an error in law or in fact. It might have been argued that unless this was so the court would have been empowered not merely to alter a sentence but also to reverse a judgment of acquittal or conviction without the necessity of finding any error in law or in fact at all, notwithstanding

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the presence of the words "correctness, legality or propriety" in s. 320 which deals with a different matter. Their Lordships express no opinion on this topic. It is sufficient for them to say that the argument would have been a legitimate one and, had it been successful, the court would have been just as powerless to increase the sentence under the revision sections as it was under the sections relating to appeal. It would not, in their Lordships' view, be right to dismiss the appeal on the assumption, which is fundamental in Mr. Gahan's argument, that the court could clearly have done in revision what it was not competent to it to do on appeal, i.e., to increase a sentence without there being any error in law or in fact.

Their Lordships should add that they do not accept Mr. Page's contention that the case is not one where it can be said that the record came "to the knowledge of the court" within s. 322. They consider that the requirements of the section in that respect were duly satisfied. They also make no reference to the Indian cases of *Kishan Singh* v. *King-Emperor* (1), or *Sayyapureddi Chinnayya* v. *King-Emperor* (2) cited by Mr. Page. In those cases the questions of want of jurisdiction were of a different character.

Their Lordships will humbly advise His Majesty that the appeal should be allowed.

Solicitors: *Peacock & Goddard; Burchells.*

(1) L. R. 55 I. A. 390. (2) (1920) L. R. 48 I. A. 35.

[HOUSE OF LORDS.]

H. L. (E.)*
1950
Jan. 17, 18 19; *Mar.* 21.

JACOBS . . . . APPELLANT;

AND

LONDON COUNTY COUNCIL . . RESPONDENTS.

Negligence—Personal injuries—Forecourt between public pavement and shop—Local authority owners and occupiers of forecourt—Defective and projecting stopcock—Injury to person crossing from pavement to shop—Invitee or licensee—Nuisance adjoining highway.

A foot passenger in a public street, in order to approach a shop, stepped from the pavement on to a forecourt between the shop

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**Present:* LORD SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD MACDERMOTT AND LORD RADCLIFFE.

and the pavement. The shop was one of several in a terrace set back from the pavement, the intervening space, constituting a series of forecourts, being paved but not fenced off. The forecourt in question was not let to the tenant of the shop which it adjoined but remained in the ownership and occupation of the landlord, the county council. Owing to the defective state of a stopcock, protruding about an inch and a quarter, set in the forecourt, the foot passenger tripped and sustained injury. The shop and the home of the foot passenger formed part of a housing estate laid out by the county council, against whom the foot passenger brought an action for damages.

Held, (1.) that the foot passenger was a licensee and not an invitee and, accordingly, that negligence on the part of the owner of the forecourt was not established.

Fairman v. *Perpetual Investment Building Society* [1923] A. C. 74, followed.

(2.) that the foot passenger, having at the time of the accident deliberately left the highway, the owner of the forecourt was not liable on the ground that the stopcock constituted a public nuisance adjoining the highway. It was irrelevant whether the foot passenger knew where the highway ended and the forecourt began.

Owens v. *Thomas Scott & Sons (Bakers) Ld.* [1939] 3 All E.R. 663 overruled on this point.

Semble that the stopcock protruding so little could not, in any event, constitute a public nuisance.

A reason given by a judge for his decision is not to be regarded as obiter dictum merely because he has given another reason also.

Decision of the Court of Appeal [1949] 1 K. B. 685, affirmed.

APPEAL from the Court of Appeal (Tucker, Asquith and Singleton L.JJ.).

The facts, stated by Lord Simonds, were as follows: On June 9, 1947, the appellant, Mrs. Jacobs, who lived at No. 255, Bennett's Castle Lane, Dagenham, in the county of Essex, left her house to visit a shop, No. 240, Bennett's Castle Lane, which was let by the respondents, the London County Council, to Smith Gard & Co. Ld., pharmaceutical chemists. Bennett's Castle Lane was a highway vested in Ilford Borough Council and was within a large area laid out by the council as a housing estate known as the Becontree Estate. Upon that part of the estate which abutted on Bennett's Castle Lane the county council built a number of shops (including No. 240) with flats above them. The frontages of these shops were set back from the pavement a distance of about 10 feet 6 inches and the intervening space, which constituted a series of forecourts, was levelled and paved with paving stones similar to those of the pavement of the highway. These forecourts were not fenced, but the paving stones were so laid that there was a continuous line indicating which was forecourt and which was pavement. To the casual passer-by, however, the pavement of the highway and the forecourts were indistinguishable. Though there was at one time a dispute whether the forecourts were let with the adjoining shops, it was now clear that, at least so far as No. 240 was concerned, the forecourt was not included in the demise to Smith Gard & Co. Ld., but was at all material times in both the ownership and the occupation of the council.

In the forecourt in front of No. 240 at a distance of about 2 feet from the line marking the boundary between the pavement and the forecourt there was a stopcock which controlled the water supply to the flats above the shop. The paving stones surrounding this stopcock had sunk so that it projected to the extent of an inch and a quarter above them. The appellant, having on June 9, 1947, walked along the pavement until she was nearly opposite the shop turned to her left and walked towards it. Perforce she crossed the forecourt, and in doing so she caught her toe against the projecting stopcock. She fell and sustained a somewhat serious injury in the fracture of her right patella.

In consequence she brought an action against the council in Ilford county court claiming damages. Her action was in the first place framed in negligence: she alleged that the council as occupiers of the forecourt, had committed a breach of their duty to her as an invitee thereupon. Alternatively she laid her claim in nuisance, alleging that the condition of the stopcock and surrounding paving stones constituted a nuisance adjoining the highway whereby she had suffered injury. In the course of the proceedings the appellant's husband was joined as plaintiff, but nothing turned on this or on the fact that it was at one time in issue whether the council or Smith Gard & Co. Ld., were occupiers of the forecourt.

The county court judge found that the appellant had not herself been guilty of any negligence in not observing the condition of the paving stones and stopcock, and that she was using reasonable care for her own safety. He further held that she was an invitee on the forecourt. The learned judge did not state upon what facts or for what reason he came to this conclusion. In regard to the council, he found that they did not take reasonable care to guard against such danger or even to acquire knowledge of its arising, and that they ought to have known of it and failed to do so owing to their lack of reasonable care in the matter of inspection.

The judge, on the alternative plea of nuisance, also found in favour of the appellant. He said: "I also find that the "stopcock and surrounding stones constituted a nuisance. "The cases of nuisances on land adjoining the highway are "not in point, for the female plaintiff did not stray onto the "forecourts by accident. She went there deliberately; but "she was there lawfully and not as a trespasser." In his opinion the appellant, being lawfully on the land of the council and being injured by reason of a nuisance on their land, was entitled to succeed on this ground also. He thereupon awarded her general and special damages. The council appealed to the Court of Appeal (Tucker, Asquith and Singleton L.JJ.) who unanimously reversed the judgment of the county court judge upon both points.

The appellant appealed to the House of Lords.

Beresford K.C. and *Roy Monier-Williams* for the appellant (plaintiff). The appellant at the material time was an invitee of the council, and *Fairman* v. *Perpetual Investment Building Society* (1) did not compel the court to hold that she was not an invitee. In that case the House of Lords came to a correct decision on the facts, but it does not cover the present case. The circumstances of the present case are different and the respective appellants are not in the same category. Further, the dicta relied on by the council are obiter and are wrong. On the facts of the case the dicta were not part of the ratio decidendi: the learned lords were stating what in some other set of circumstances they would have held. If it is not necessary for a court to decide a particular point because the facts are all one way, then anything that may be said on it is obiter and not binding. The House may be assisted by the dicta in *Fairman's* case (1), but this case must be decided on the facts found in the county court, which are all in favour of the appellant. On these facts the House must determine the duty owed by the council to the appellant. She must be treated as an invitee, and if she is the council concede that she is entitled to succeed in the action. If she is only a licensee she cannot succeed.

(1) [1923] A. C. 74.

The first attempt to depart from the principles enunciated obiter in *Fairman's* case (1) was in *Haseldine* v. *C. A. Daw & Son Ld.* (2) in the judgment of Scott L.J., which correctly set out the law. Other relevant cases on this point are *Smith* v. *London & St. Katharine Docks Co.* (3); *Mersey Docks and Harbour Board* v. *Proctor* (4); *Sutcliffe* v. *Clients Investment Co. Ld.* (5); *Cunard* v. *Antifyre Ld.* (6); *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (7); *Ellis* v. *Fulham Borough Council* (8); *Glasgow Corporation* v. *Taylor* (9); *Griffiths* v. *St. Clement's School Managers* (10); *Taylor* v. *Liverpool Corporation* (11); *Horton* v. *London Graving Dock Co. Ld.* (12); *Stowell* v. *Railway Executive* (13).

Alternatively the danger in question caused by the council constituted a nuisance adjoining the highway in respect of which the appellant can sue for damages, because as a user of the highway she has suffered injury by reason of it. This was a public nuisance: see *Bromley* v. *Mercer* (14); *Wilchick* v. *Marks and Silverstone* (15); *Owens* v. *Thomas Scott & Sons (Bakers) Ld.* (16); and *Heap* v. *Ind Coope & Allsopp Ld.* (17). If a nuisance is allowed to exist on land which all reasonable people would think to be part of the public highway a person injured has a cause of action against the owner.

Roy Monier-Williams following. On the assumption that in *Fairman's* case (1) the observations relied on by the council were rationes decidendi and not obiter dicta they are distinguishable. The appellant here is an invitee and on the facts is in a different and higher category. The common interest constituting a person an invitee may be quite intangible: see *Sutcliffe* v. *Clients Investment Co. Ld.* (5); *Griffiths* v. *St. Clement's School Managers* (10); and *Stowell* v. *Railway Executive* (13). Such a common interest may be implied. The interest need not be material provided that it is capable of being expressed in language. In cases arising out of accidents at docks the common interest of the dock owners and of men employed there by contractors has generally been very intangible. Its basis has been that it is in the interest of dock-owners that ships should come in, and therefore that it is in their interest to provide for their repair by contractors who will employ painters, boilermakers, etc., for that purpose. In the present case there are more substantial grounds for basing the relationship of invitor and invitee than in *Fairman's* case (1) and the appellant's common interest is not more intangible than in *Stowell* v. *Railway Executive* (2).

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(1) [1923] A. C. 74.
(2) [1941] 2 K. B. 343.
(3) (1868) L. R. 3 C. P. 326.
(4) [1923] A. C. 253.
(5) [1924] 2 K. B. 746.
(6) [1933] 1 K. B. 551.
(7) [1929] A. C. 358.
(8) [1938] 1 K. B. 212.
(9) [1922] 1 A. C. 44.
(10) [1938] 3 All E. R. 537.
(11) [1939] 3 All E. R. 329.
(12) [1949] 2 K. B. 584.
(13) Ibid 519.
(14) [1922] 2 K. B. 126.
(15) [1934] 2 K. B. 56.
(16) [1939] 3 All E. R. 663.
(17) [1940] 2 K. B. 476.

Here the council have laid out a housing estate for the benefit and convenience of the tenants and have done everything they can to induce them to come to the shops. If it were not for the amenities which they have provided ; if, for example, there were foundrous earth in front of the shops instead of forecourts, people would not go to them. There is evidence that to the knowledge of the council this forecourt was habitually used by the public as part of the pavement. They might have put up barriers with entrances leading to the shops, but they did not do so. The council, to promote the letting of the houses on the estate and to assist the families residing there, set up the shops, which themselves command good rents and are a source of revenue. They thus cater for the tenants and improve their own revenue, and this constitutes a common interest.

Further, in the case of an unfenced field, the owner would not be liable to a user of the highway who fell into a pit dug 500 feet away from it, but it might be otherwise if the pit were only inches away from it, even though the landowner had not (as here) done anything to make people think that the spot was part of the highway. [He referred to *Wringe* v. *Cohen* (3), and *Heap* v. *Ind, Coope & Allsopp Ld.* (4).].

Lord Simonds intimated that their Lordships did not require to hear argument on behalf of the council on the question of nuisance.

Hugh Francis for the council. It is well established that the nature and extent of the duty owed by an owner of land varies according as the person on his land is an invitee, a licensee or a trespasser. In each case the court must decide what is the duty owed : see *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck* (5). The appellant was at the material

(1) [1923] A. C. 74.
(2) [1949] 2 K. B. 519.
(3) [1940] 1 K. B. 229.
(4) [1940] 2 K. B. 476.
(5) [1929] A. C. 358, 372.

time a licensee of the council and not an invitee. This case is indistinguishable from *Fairman's* case (1) in which the opinions of the majority were right in principle, and in which the question was the same. The observations on this point are part of the ratio decidendi, and the case did not turn on the narrow issue whether the stairs were dangerous. Scott L.J. was wrong in *Haseldine's* case (2) in treating the material observations as mere obiter dicta, and *Fairman's* case (1) has rightly been treated as a leading authority on this branch of the law. The test in deciding whether observations are obiter dicta is not whether they were essential to the decision. If that were so, then, when a court gave several reasons for a decision, none could be regarded as binding because no one reason individually was essential: see *Cheater* v. *Cater* (3), *London Jewellers Ld.* v. *Attenborough* (4), and an article on Ratio Decidendi and Obiter Dictum in Appellate Courts, 63 Law Quarterly Review 461, 462, citing *Deakin* v. *Webb* (5).

The cases arising out of accidents on docks and railways are distinguishable. In each case the plaintiff entered property on which the defendants carried on a business the nature of which was such as necessarily to involve persons from outside coming on to the premises. For example, ships would not come to a dock if no one could reach them. A good analogy to the railway cases would be the case of a husband accompanying his wife to, say, Harrods in order to carry her parcels and assist with advice; he would be an invitee. But there is no analogy between the dock and railway cases and the present case. The council here were carrying on no business in the forecourt. *Owens* v. *Thomas Scott & Sons* (*Bakers*) *Ld.* (6) does not help the appellant. It was decided on the basis that the plaintiff was a person using the highway, which the appellant was not.

Beresford K.C. in reply. All the facts that could be found in favour of the appellant have been found by the county court judge and these cannot be disturbed by this House. As to the common interest which may create the status of invitee, this need not be a business interest. The respondents in fact had an interest in the shops being let and they invited the public to pass over this forecourt. [He referred to *Horton*

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(1) [1923] A. C. 74.
(2) [1941] 2 K. B. 343, 350.
(3) [1918] 1 K. B. 247, 252.
(4) [1934] 2 K. B. 206, 222.
(5) (1904) 1 C. L. R. 585, 604–5.
(6) [1939] 3 All E. R. 663.

v. *London Graving Dock Co. Ld.* (1) and *Weigall* v. *Westminster Hospital Governors* (2).]

Their Lordships took time for consideration.

Mar. 21. LORD SIMONDS (having stated the facts): My Lords, upon the first ground of claim, that of negligence, the question turns wholly on the category into which the appellant is to be placed. If she was an invitee on the forecourt of No. 240, then her claim is conceded by the council to be valid: if she was only a licensee, then she concedes that it is not.

Invitee or licensee, that, then, is the question. For the council it is contended that the question is concluded in favour of licensee by the decision of this House in *Fairman* v. *Perpetual Investment Building Society* (3); for the appellant, that the relevant observations of the noble and learned Lords who heard that case were obiter dicta and that it is not an authority binding on this House to the effect that a person in the position of the appellant Fairman is in the category of licensee not invitee, and further that in any event the circumstances of the appellant, Mrs. Jacobs, were different from those of Mrs. Fairman and she at any rate was an invitee.

My Lords, the appellant was, I think, encouraged to adopt the first branch of her contention by the observations of Scott L.J. in *Haseldine* v. *C. A. Daw & Son Ld.* (4). That Lord Justice (differing on this point from Goddard L.J.), expressed the opinion that the observations of the learned Lords in *Fairman's* case (5) upon this question were all obiter dicta and felt at liberty to state a different view of the law. So far as I have been able to discover, the opinion of Scott L.J. has not received any support either in judicial decision or text-book of authority, and for a quarter of a century *Fairman's* case (5) has been regarded as a definitive statement of the law. However, in the present case the Lords Justices who heard the appeal thought that the matter admitted of sufficient doubt to justify the admission of an appeal to this House. Hence it falls to your Lordships to determine what *Fairman's* case (5) decided and for what proposition of law it is an authority, binding alike on this House and on every court of law in this country.

My Lords, I can entertain no doubt that *Fairman's* case (5)

(1) [1950] 1 K. B. 421, 432.
(2) (1936) 52 T. L. R. 301.
(3) [1923] A. C. 74.
(4) [1941] 2 K. B. 343.
(5) [1923] A. C. 74.

decided that Mrs. Fairman was a licensee upon the premises where she suffered damage and that that decision was the ratio decidendi or a ratio decidendi (it matters not which) of the case. It is not, I think, always easy to determine how far, when several issues are raised in a case and a determination of any one of them is decisive in favour of one or other of the parties, the observations upon other issues are to be regarded as obiter. That is the inevitable result of our system. For while it is the primary duty of a court of justice to dispense justice to litigants, it is its traditional role to do so by means of an exposition of the relevant law. Clearly such a system must be somewhat flexible, with the result that in some cases judges may be criticized for diverging into expositions which could by no means be regarded as relevant to the dispute between the parties; in others other critics may regret that an opportunity has been missed for making an oracular pronouncement upon some legal problem which has long vexed the profession. But, however this may be, there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing. A good illustration will be found in *London Jewellers Ld.* v. *Attenborough* (1). In that case the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in *Folkes* v. *King* (2). In the latter case the court had given two grounds for its decision, the second of which was that "where a man "obtains possession with authority to sell, or to become the "owner himself, and then sells, he cannot be treated as having "obtained the goods by larceny by a trick." In the former case it was contended that, since there was another reason given for the decision, the second reason was obiter. But Greer L.J., from whose judgment I have taken the passage above cited (3), said in reference to the argument of counsel (3): "I cannot help feeling that if we were unhampered by authority "there is much to be said for this proposition which commended "itself to Swift J., and which commended itself to me in "*Folkes* v. *King* (2), but that view is not open to us in view of "the decision of the Court of Appeal in *Folkes* v. *King* (2).

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(1) [1934] 2 K. B. 206.

(2) [1923] 1 K. B. 282.

(3) [1934] 2 K. B. 206, 222.

"In that case two reasons were given by all the members of "the Court of Appeal for their decision and we are not entitled "to pick out the first reason as the ratio decidendi and neglect "the second, or to pick out the second reason as the ratio "decidendi and neglect the first: we must take both as "forming the ground of the judgment." So also in *Cheater* v. *Cater* (1), Pickford L.J., after citing a passage from the judgment of Mellish L.J., in *Erskine* v. *Adeane* (2) said: "That "is a distinct statement of the law and not a dictum. It is "the second ground given by the Lord Justice for his judgment. "If a judge states two grounds for his judgment and bases "his decision upon both, neither of those grounds is a dictum."

The principle, which can be thus simply stated, is not always easy of application, particularly where the judgments of an appellate court consisting of more than one judge have to be considered. An illuminating discussion of the difficulties that may then arise will be found in an article on Ratio Decidendi and Obiter Dictum in Appellate Courts by Professor Paton and G. Sawer in 63 Law Quarterly Review 461. But it does not appear to me that *Fairman's* case (3) should cause any difficulty. In that case the facts, which I take from the headnote, were, that the defendants owned a block of flats which they let to various tenants, the defendants keeping possession and control of the common staircase giving access to the flats. The stairs were made of cement reinforced by iron bars embedded in the cement and running along the whole length of the tread. Owing to the wearing away of the cement in some cases irregular depressions were scooped out behind the iron bars. The plaintiff who lodged with her sister in a flat on the fourth floor, of which the sister's husband was tenant, while descending the stairs, caught her heel in a depression so formed and fell and was injured. The trial judge found that the defendants were not guilty of negligence: that the state of the staircase was not dangerous at the time of the accident: that the depression which caused the plaintiff to fall was not in the nature of a concealed danger or trap, but was obvious and could have been seen by the plaintiff if she had looked. He accordingly gave judgment for the defendants and his judgment was affirmed by the Court of Appeal.

When the case came on appeal to this House, it was clear that it was important for the appellant to establish as high

(1) [1918] 1 K. B. 247, 252.

(2) (1873) L. R. 8 Ch. 256.

(3) [1923] A. C. 74.

a degree of responsibility in the respondents as possible, and it was clear too that, if she was an invitee, that degree was higher than if she was a licensee. Accordingly her counsel (1), after referring to *Miller* v. *Hancock* (2) and stating the difference to which I have referred, urged that the appellant was "indirectly the invitee of the respondents." And so also counsel for the respondents opened his argument by saying (3): "Qua the respondents the appellant was not an invitee." Thus while, no doubt, much argument ranged round other questions, what was the true inference to be drawn from the evidence, what was the measure of liability if the plaintiff was in fact an invitee, what was really decided in the much debated case of *Miller* v. *Hancock* (2) and so on, yet it was an issue clearly raised: what was the status of the appellant, invitee or licensee? And that issue was thus decided. Lord Buckmaster, finding himself unable to agree with the trial judge, held that the state of the staircase was a dangerous trap so that the appellant was entitled to succeed whatever her status: it is possible that he would have decided in favour of invitee: that appears to be the purport of his final observation. Lord Atkinson decided (4) that she was quoad the landlord when using the stairs "at most merely his licensee." Lord Sumner, after stating the relevant facts, said (5): "I think that the plaintiff was the defendants' licensee not "their invitee" and went on to explain why. Lord Wrenbury at an early stage of his opinion said (6): "It is well to define "at the outset what, in my judgment, is the relation between "the plaintiff and the landlord in respect of which she can sue," and proceeded to define it thus, "She was, I think, the invitee "of the tenant, and, in consequence, the licensee of the "landlord." Finally, Lord Carson (7) agreed in the conclusion reached by Lord Buckmaster. I do not find in his speech any reference to the immediate question. Thus three of the five noble and learned Lords who heard the appeal decided that Mrs. Fairman was a licensee, not an invitee. To treat their deliberate conclusions as obiter would not be consonant with the principle which is in my view essential to our system of case law and precedent.

This House, then, is bound by *Fairman's* case (8). The question remains whether the facts of the case now under appeal distinguish it in principle. I have already set out the facts upon which in *Fairman's* case (1) the plaintiff was held to be a licensee. It would in my opinion be an unjustifiable refinement of the law for this House which declared Mrs. Fairman to be a licensee to declare the appellant Mrs. Jacobs to be other than a licensee. I can find no essential distinction between the two sets of facts : if there is one, it is, I think, to the disadvantage of the appellant Mrs. Jacobs, inasmuch as the forecourt upon which she walked and fell was apparently, though not dedicated as a highway, open to the public at large, whether or not they were intending to enter the shop or even to gaze into its windows. I do not think that she had a higher right than any other member of the public, of whom it would be impossible to predicate that he had any common interest with the council in the forecourt.

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(1) [1923] A. C. 76.
(2) [1893] 2 Q. B. 177.
(3) [1923] A. C. 74, 77.
(4) Ibid. 85.
(5) Ibid. 92.
(6) Ibid. 95.
(7) Ibid. 98.
(8) Ibid. 74.

My Lords, I have deliberately used the expression " common " interest," because in *Mersey Docks and Harbour Board* v. *Procter* (2) (a case heard in this House just three months after judgment had been delivered in *Fairman's* case (1)) Lord Sumner said : " The leading distinction between an invitee " and a licensee is that, in the case of the former, invitor and " invitee have a common interest, while, in the latter, licensor " and licensee have none." It is possible that this House may on some future occasion have to examine further what for the purpose of this distinction constitutes a common interest, but it is clear that Lord Sumner did not think that there was a common interest between Mrs. Fairman and the landlords of the block of flats in which she was the lodger of their tenant. A fortiori, as I think, there is no common interest here.

Finally, my Lords, upon this branch of the case I would say that I do not intend either to cast any doubt on, or to affirm, the authority of cases which have long been cited as examples of such a common interest, e.g., the so-called dock cases and railway cases where the defendants were carrying on the business of a dock or railway undertaking and the plaintiffs, being lawfully upon their premises, suffered injury thereon. It is not necessary to do so, and such a task should only be assumed where the facts of the case demand it, and then only after a more exhaustive examination of the authorities than the present appeal requires.

Since writing this part of my opinion my attention has been

(1) [1923] A. C. 74 (2) Ibid. 253, 272.

called to a case recently tried in Eire. I refer to *Boylan* v. *Dublin Corporation* (1) in which the Irish Supreme Court distinguished *Fairman's* case (2). Upon that I make no comment. But I observe that Black J. in a reasoned judgment supported the view expressed by Scott L.J., in *Haseldine's* case (3) that the opinions given by the House in *Fairman's* case (2) upon the question of licensee or invitee were obiter. The judge's observations led me to reconsider what I had written, but I am unable to come to a different conclusion. As I have already said, I recognize that the dividing line is difficult to draw, but it would, I think, be to deny the importance, I would say the paramount importance, of certainty in the law to give less than coercive effect to the unequivocal statement of the law made after argument by three members of this House in *Fairman's* case (2). Nor, perhaps I may add, are your Lordships entitled to disregard such a statement because you would have the law otherwise. To determine what the law is, not what it ought to be, is our present task.

It remains to examine the appellant's alternative claim, viz., that the council were liable to her because the condition of the paving stones round the stopcock constituted a nuisance adjoining the highway. As I have said, the county court judge on this ground also decided in her favour. He held that she was lawfully on the land of the council (as she undoubtedly was) and that the principles laid down in *Wringe* v. *Cohen* (4) were applicable. It was clear, however, that the judge was in error in thinking that that case was relevant : for it decided no more than that, where " premises on a high-" way become dangerous and constitute a nuisance, so that " they collapse and injure a passer-by or an adjoining owner, " the occupier or owner of the premises, if he has undertaken " the duty to repair, is answerable, whether he knew or ought " to have known of the danger or not." I cite the headnote which, I think, accurately states the decision, though I would observe that the dispute was between adjoining owners, the premises of one having been damaged by the defective condition and collapse of the other, and references to highway and passer-by were alike strictly unnecessary. But in any case learned counsel for the appellant did not either in the Court of Appeal or in this House rely on the authority of *Wringe* v. *Cohen* (4), but claimed that as a user of the highway she had

(1) [1949] I. R. 60.
(2) [1923] A. C. 74.
(3) [1941] 2 K. B. 343.
(4) [1940] 1 K. B. 229.

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suffered injury by reason of a nuisance adjoining the highway caused by the council. That at least is how I understand the claim to have been formulated in this House.

My Lords, the answer given by the Court of Appeal to the claim so formulated is that the appellant was not at the time of her accident a user of the highway. She was, as they held and, I think, rightly held, a licensee upon the land of the council, who failed in no duty that they owed to her in that capacity. It is the validity of this answer that must be examined. But at the risk of provoking the criticism, to which at an earlier stage of this opinion I referred, I would make some preliminary observations.

In a recent article on The Boundaries of Nuisance in 65 Law Quarterly Review 480, to which I would express my indebtedness, Professor Newark observes (p. 481) that in the American Restatement of the Law of Torts the word " nuisance " has been eschewed as being " attended with so much confusion " and uncertainty of meaning." That drastic step is not open to your Lordships. Today as at any time during the past five hundred years a plaintiff may found his claim in nuisance and call it nuisance. But the confusion is a real one and, in relation to the boundaries of nuisance and negligence, has led Professor Winfield to say (see Textbook of the Law of Tort, 4th ed., at p. 472) : " Until quite recently " there was a hybrid action of nuisance and negligence. " Sometimes it looked as if negligence were the substance " of the action and nuisance were an untechnical term ; " sometimes the exact reverse would be the truth, and then, " again, ' negligent ' has figured as a persistent term . . . . only " to be persistently ignored by the court in deciding on grounds " of nuisance." Yet as Lord Sumner (then Hamilton L.J.) said in *Latham* v. *R. Johnson & Nephew, Ld.* (1), " the " differences between cases of nuisance and cases of negligence " must never be lost sight of."

It will, as I think, help to keep sight of those differences, if two propositions are maintained, first, that negligence is not necessarily an element in nuisance, and, second, that where the nuisance, in respect of which a private person sues, is a " public nuisance," he has no personal right of action, unless he can prove special damage beyond that suffered by other members of the public. It may also be useful to remember how far from its former scope and meaning nuisance has strayed, largely, I suppose, by reason of the impact of the law of public nuisance upon the original conception of that tort. For of this there is no doubt, that originally nuisance meant nothing else than an unlawful interference with a man in respect of the use and enjoyment of his land, whereby he suffered damage, by an act done by another on his own, not on the plaintiff's land: and for this purpose "land" at a very early date included not only a corporeal but also an incorporeal hereditament such as a private right of way.

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(1) [1913] 1 K. B. 398, 413.

In the present case the appellant's case rests not on the unlawful interference with her enjoyment of any corporeal or incorporeal hereditament, but upon the proof of a public nuisance in respect of which she as a member of the public suffered special damage. This may be somewhat elaborated. "Nuisance"—I quote Pratt and Mackenzie on the Law of Highways (18th ed.) p. 107—"may be defined, with reference "to highways, as any wrongful act or omission upon or near "a highway, whereby the public are prevented from freely, "safely, and conveniently passing along the highway." The question, then, may be stated with particularity. Has the appellant proved the existence of a public nuisance as so defined in reference to the highway, Bennett's Castle Lane? And further, has she proved that she, as a member of the public using that highway, suffered special damage?

Upon the first question I feel great difficulty. The county court judge has not, I think, addressed his mind to it. For, while saying that "the stopcock and surrounding stones "constituted a nuisance," he adds that "the cases as to "nuisance on land adjoining a highway are not in point." Yet the appellant's claim in nuisance must fail in limine unless the nuisance of which she complained was in respect of some act or omission upon the highway or the land adjoining it. I gravely doubt whether there is any finding which would justify your Lordships in holding that a public nuisance was proved, and I should myself hesitate long before I came to the conclusion that the owner of land adjoining the highway was guilty of a public nuisance because he allowed a stopcock on that land to protrude by so little from the surrounding stone. I do not ignore that the learned judge found the appellant guilty of no negligence, but it does not follow, because she was not guilty of negligence, that her accident was caused by any act or omission of the council which amounted to a public nuisance. It is not, however, on this point only that the appellant's claim cannot be sustained.

I turn to the second question and again quote the judge: the appellant, he says, "did not stray on to the forecourts "by accident. She went there deliberately. But she was "there lawfully, not as a trespasser." He had indeed already held that she was an invitee on the land of the council. At any rate, whether as licensee or invitee, she was there lawfully and had claimed that the council as occupiers of the land owed her in that capacity a certain duty of care.

I would not say, my Lords, that an alternative claim in negligence and nuisance can never be permissible: see, for example, *Crane* v. *South Suburban Gas Co.* (1). But it is, I think, essential to keep in mind where the accident takes place and why the plaintiff is in that place. For the confusion, to which I have referred and of which among a hundred examples in the reports I would mention such cases as *Procter* v. *Harris* (2), *Flower* v. *Adam* (3), and *Coupland* v. *Hardingham* (4) must be increased, if a plaintiff can allege that, being on the defendant's land, he was as invitee owed a duty of care, and can then, it being found as a fact that he was truly on the defendant's land but only as licensee, allege that he was still a user of the highway. The duty which every citizen owes not to commit a public nuisance at peril of an indictment or of an action by a member of the public who has suffered special damage is one thing, and the duty of care which an occupier of land owes to his invitees or licensees upon it is another. I decline to introduce a third category, a duty which the occupier of land owes to one who was lately on the highway just because he was lately on it.

It is then, as I see it, a question of fact whether the appellant suffered injury while using the highway and it is clear that she did not. The judge has in fact so found. If so, her claim must fail. For it is then irrelevant whether or not the council have been guilty of some act or omission "whereby the public "are prevented from freely, safely and conveniently passing "along the highway." She was not in fact passing along the highway at all. Nothing that I say is intended to cast any doubt upon the proposition that a man may be regarded as a user of a highway though he has diverged from it accidentally as in *Barnes* v. *Ward* (5), or has made a false step or become giddy (see *Hardcastle* v. *South Yorkshire Railway & River*

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(1) [1916] 1 K. B. 33.

(2) (1830) 4 C. & P. 337.

(3) (1810) 2 Taunt. 314.

(4) (1813) 3 Camp. 398.

(5) (1850) 19 L. J. (C. P.) 195.

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Dun Co. (1)) and thus left it. But the House was referred to no case and my researches have led me to none where a plaintiff has deliberately left the highway to go elsewhere, and, having left it and having suffered injury upon the adjoining land, has then been held entitled to recover upon a claim of public nuisance in respect of which he suffered special damage. Far as the law of nuisance has travelled beyond its original limits, this further extension appears to me to be justified neither by reason nor by authority.

My Lords, it does not escape me that in the result a distinction which may appear to be capricious will exist between two cases, the one of a person who like the appellant suffers an injury on land adjoining the highway, the other of a person who suffers similar injury upon the highway itself. The distinction has in fact been commented on in *Howard* v. *Walker* (2). But, my Lords, such distinctions must exist in the law so long at least as a distinction exists between public and private property, and it is ultimately upon that distinction, perhaps, that the different fates of my hypothetical victims depend.

I have said that no authority has been cited contrary to the view which I have submitted to the House. On the other hand, there are cases which, I think, clearly support that view. For I can see no essential difference in the fact, if indeed it is the fact (for there was no evidence of it), that the appellant did not know where the highway ended and the forecourt began. Her rights in this respect are the same whether the stopcock was two feet from the highway or two feet from the shop front. I shall follow Tucker L.J., in looking back no further than *Bromley* v. *Mercer* (3). In that case a child, while upon a visit to the defendant's premises, which abutted on the highway, was injured by a heavy stone which fell from the wall upon her. It was contended, and the Commissioner who heard the case at nisi prius so held, that the defendants were liable to her in nuisance. But in the Court of Appeal her claim was rejected, Lord Sterndale M.R. (4) pointing out the fallacy of saying that " where there is a " nuisance to the highway everyone who comes in proxi- " mity to it has a right of action which he can carry " about with him on to private premises," and Scrutton L.J.

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(1) (1859) 4 H. & N. 67.

(2) [1947] K. B. 860.

(3) [1922] 2 K. B. 126.

(4) Ibid. 129.

(1) saying, "the only person who can successfully sue for "damages is one who is injured in using the highway. There "is no authority for the extension of the law which the learned "Commissioner has made, and in my opinion it is erroneous." The Lord Justice further pointed out that in *Harrold* v. *Watney* (2) the plaintiff who was held entitled to recover damage was actually using the highway. To the same effect was the recent case of *Howard* v. *Walker* (3) to which I have already referred. There the plaintiff after leaving a shop suffered injury on its forecourt on her way to the highway. There too Lord Goddard C.J. rejected a claim laid in nuisance on the ground that it was not as a user of the highway that she suffered injury but while she was on the forecourt as a visitor or invitee of the tenant. Consistently with what I have already said I regard these as clearly right decisions.

Upon this second branch of the case I must add that the case of *Owens* v. *Thomas Scott & Sons* (*Bakers*) *Ld.* (4), upon which the appellant relied cannot be regarded as in harmony with the cases that I have cited.

For these reasons I am of opinion that this appeal should be dismissed.

LORD NORMAND. My Lords, I concur in the opinion which has just been delivered by my noble and learned friend on the woolsack sack

LORD MORTON OF HENRYTON. My Lords, I also concur.

LORD MACDERMOTT. My Lords, I agree.

LORD RADCLIFFE. My Lords, I concur.

Appeal dismissed.

Solicitors: *Shaen, Roscoe & Co.*; *J. H. Pawlyn.*

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(1) [1922] 2 K. B. 131.
(2) [1898] 2 Q. B. 320.
(3) [1947] K. B. 860.
(4) [1939] 3 All E. R. 663.

GIDEON NKAMBULE AND OTHERS . . APPELLANTS ;
AND
THE KING . . . . . . RESPONDENT.

J. C.*
1950
Jan. 23 :
Mar. 29.

ON APPEAL FROM THE HIGH COURT OF SWAZILAND

Criminal law (Swaziland)—Murder—Accomplice evidence—Admissibility —South African cautionary rule of practice applicable—Power of Judicial Committee to overrule its own decisions—Agreement of assessors—To be noted on record—Ministerial obligation—Omission not an invalidating irregularity—Swaziland Criminal Procedure and Evidence Proclamation, 1938 *(as amended by Proclamation No.* 43 *of* 1942), *s.* 8 ; *(as amended by Proclamation No.* 14 *of* 1944), *s.* 231.

By s. 231 of the Swaziland Criminal Procedure and Evidence Proclamation, 1938, as amended by Proclamation No. 14 of 1944 : " Any court which is trying any person on a charge of any offence " may convict him of any offence alleged against him . . . . on " the single evidence of any accomplice : provided that the offence " has, by competent evidence, other than the single and " unconfirmed evidence of the accomplice, been proved to the " satisfaction of such court to have been actually committed."

The phrase " the single evidence of any accomplice " in s. 231 means the evidence of any one accomplice, and the evidence of another accomplice is " competent evidence, other than the " single and unconfirmed evidence of the accomplice," within the meaning of the proviso to s. 231, to establish the commission of the offence. The evidence of two accomplices, unsupported by any other testimony, is therefore sufficient, if believed and if due warning of the danger of accepting it is present to the mind of the judge and his assessors, to warrant the conviction of those accused of a crime.

Construction of s. 231 and its proviso adopted by the Board in *Tumahole Bereng* v. *The King* [1949] A. C. 253, not followed.

Observations on the Board's power to re-open and reconsider its own decisions.

Rex v. *Sethren* (1915) S. A. L. R., (T. P. D.) 257, and *Rex* v. *Thielke* (1918) S. A. L. R. (A. D.), 373, referred to.

The cautionary rule of practice regarding the acceptance of accomplice evidence as followed in South Africa (see the judgment of Schreiner J.A. in *Rex* v. *Ncanana* (1948) 4 S. A. L. R. 399, 405) is binding in Swaziland.

The provision in s. 8 of the Swaziland Criminal Procedure and Evidence Proclamation, 1938, as amended by Proclamation 43 of 1942, that " the agreement or disagreement of such assessor

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**Present :* LORD PORTER, LORD GREENE, LORD OAKSEY, LORD REID and SIR MADHAVAN NAIR.

"or assessors with the decision of the judge shall be noted on the "record," does not impose on the judge the duty of seeing that it is noted. It is a purely ministerial obligation left to be performed by the court officials, and, while its omission in a case where their assent has been publicly proclaimed—by the judge in open court and in the presence of the assessors stating in terms that they had all come to the conclusion that the accused persons were guilty of the offence charged—may be an irregularity, it is not of such importance as to invalidate the conviction.

Mahlikilili Dhalamini v. *The King* [1942] A. C. 583, distinguished. Judgment of the High Court of Swaziland affirmed.

APPEAL (No. 24 of 1949), in forma pauperis, from a judgment of the High Court of Swaziland (October 18, 1948) whereby the appellants were found guilty of murder, and against the sentences passed on them. All the appellants were sentenced to death by the High Court, but the sentences on appellants Nos. 3, 4, 5 and 6 were later commuted to imprisonment with hard labour for 15, 15, 5 and 10 years respectively. Special leave to appeal in forma pauperis to His Majesty in Council was granted by an Order in Council dated July 28, 1949.

The following facts are taken from the judgment of the Judicial Committee. The appellants were jointly charged with the murder, on or about May 17, 1947, at Mpopono, in the district of Central Swaziland, of one Northway Mdingi. According to the case for the Crown, the death of the deceased was the result of a ritual murder. The deceased, it was said, was a Xosa, and in charge of a school at Mpopono. He lived in the same village as appellants Nos. 1 and 5, who were husband and wife. No. 2 also lived in that village ; No. 3 lived about two miles away, and No. 4 lived at Paulo's kraal, which was about 250 yards distant from No. 2's home. The body of the deceased was not discovered until Thursday, May 22, 1947, when it was found in a stream about 550 yards from the hut where it was alleged he was killed, the hut itself being in or near the village in which No. 1 lived.

The principal evidence implicating the accused persons was that of two accomplices, Violina Hlatshwako and Matanjana Dhlamini. Violina Hlatshwako was a female school teacher on the staff of the deceased's school, lived at Paulo's kraal, and was a lover of No. 1. That appellant appeared to have practised a form of "witch-doctoring," and on Saturday, May 10, 1947, he asked her to be his assistant in it. She agreed, and thereupon some rite was performed.

after which No. 1 told her that in order to complete his collection he required the bone of a Xosa, and for that purpose he proposed to kill the deceased on the following Saturday night. To assist him in that project he asked Violina to distract the attention or suspicions of the deceased. She at first demurred, but a day or two afterward was called by No. 4 to his hut, where she also found Nos. 1 and 2, and was then persuaded to consent. On Wednesday, May 14, No. 1 told her that certain persons would arrive with cattle from the paramount chief's kraal and would assist in the killing, and those persons ultimately turned out to be the accused No. 6 and the accomplice Matanjana. On Friday, May 16, she was again called by No. 4 and instructions were given in the presence of Nos. 1 and 3, and plans were discussed. It was proposed to use for the killing a hammer belonging to No. 4, which was at the time without a handle, but to which, he said, he would fit one.

According to Violina's account, No. 4 woke her up on the evening of Saturday, May 17, and she accompanied him to the kraal of No. 2, and went on to the hut of the deceased, whom she found sitting on his bed, sat down beside him and pretended to read. The deceased did not speak, and appeared to be in some sort of stupor. After a while No. 2 entered and sat on a chair, and thereafter No. 1 entered, followed by the accomplice Matanjana. No. 2 stood up and No. 6 then entered, followed by No. 4, and, on a signal given by No. 2, who said, " That is it, young man," the deceased was seized and dragged to the floor by the five men present, whereupon No. 3 entered and hit the deceased with a hammer. No. 1 then took a knife and cut something from the deceased's head, after which the body was lifted and pointed eastward and then westwards, south and north. As soon as the deceased man had been killed, Violina was sent away on the orders of No. 1, and in leaving found No. 5 standing guard outside the hut. On the following Sunday Violina was pledged to silence by No. 1 in the presence of No. 2 and Matanjana, and to ensure her compliance No. 1 showed her three skulls and informed her that she would become like those skulls if she should speak.

The other accomplice, Matanjana Dhlamini, deposed that he and No. 6 came from the vicinity of the paramount chief's kraal. They went to Mpopono with some cattle which they fetched from Bremersdorp at the request of No. 2. They arrived at the kraal of No. 2 on Friday, May 10, and during the evening No. 2 told them that he wanted to kill a man, and enlisted their aid. They agreed, as No. 2 promised them two head of cattle each. On the Saturday evening, May 17, he and No. 6 were in No. 1's hut when No. 4 arrived with Violina. Nos. 1, 2 and 3 were already there, Violina was told to go and distract the teacher's attention, and No. 5 was instructed to stand guard outside the teacher's hut. The party thereupon entered the teacher's hut and the killing took place. Matanjana's evidence in respect of the killing differed to some extent from that of Violina, but supported it in its general outline and was only at variance in certain details.

Mtonela Tabede, a constable in the Swaziland Police, gave evidence of the finding of the deceased's body on May 22, 1947, in a stream called the Mpopono stream, in about 18 inches of water, some little distance below the place where a path by which people were accustomed to pass crossed the stream. The approximate width of the stream at the place where the body was found was eight feet, and it was not in flood.

The post-mortem examination on the deceased's body was conducted by Dr. Oscar Arnheim, who was unable to find the cause of death and who certified that he found no signs of violence. He stated that the body was in an advanced state of decomposition, and that it was not possible to ascertain the cause of death or whether any violence had been used.

Some further evidence was, indeed, called on behalf of the Crown by way of implicating the appellants. A constable of the Swaziland Police, who arrested No. 1 on January 16, 1948, deposed that that appellant was in possession of a bag filled with bottles—two of which were identified by Violina as having been used at her initiation ceremony—and a skin bag containing bones which might presumably be connected with witch-doctoring, and that a hammer was found in the kraal of appellant No. 2. On the night on which Northway Mdingi was alleged to have been killed, appellant No. 3 was seen walking in the direction of the kraal of No. 2 and away from his own kraal. Appellant No. 2 was said by one witness to have spoken of having hit " a foreign guinea fowl " and put it " in the steam," and by another to have acknowledged that by " foreign guinea fowl," he meant the deceased. But that acknowledgment was denied by the first of the two witnesses, who said that he thought it only meant a bird. It was established that appellant No. 2 had been instructed

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to bring certain cattle to the village, and the hammer with which it was alleged that the killing was done was identified as lying about the kraal of No. 4, but was said to have had no handle until August, 1947. Finally the grandson of appellant No. 2 deposed to the arrival with the cattle of appellant No. 6 and Matanjana, and that they came to his grandfather's kraal on the Friday preceding the day of the alleged murder. He also said that on the Saturday evening following he slept under the bed of appellant No. 2, and that at cock crow (which he later explained as being midnight) he was awakened by appellant No. 2 trampling on him and getting into the bed.

The appellants all gave evidence on oath in their defence and denied that they took part in, or had any knowledge of, the alleged killing.

As stated, the trial judge (Sir Walter Harragin) found all the appellants guilty of murder.

1950. Jan. 16, 17, 18, 19 and 23. *Dingle Foot* and *J. B. Pittman* (of the South African Bar) for the appellants. According to the medical evidence the deceased could have met his death by foul play or he could have been drowned in the stream where he was found—the doctor found no signs of violence on the body, and he was unable to say what was the cause of death—either explanation fitted what he found. The trial judge relied for his decision almost entirely on the evidence of the two accomplices. None of the other witnesses called by way of corroboration speaks as to the cause of death; they did not add a great deal and did not implicate or purport to implicate appellants Nos. 5 and 6.

The first material enactment is the Swaziland Administration Proclamation of 1907 which, in s. 2, declares that the law to be applied is the Roman-Dutch law except in so far as it may be replaced by subsequent legislation; that is the basis of the legislation. Then came the Criminal Procedure and Evidence Proclamation, 1938 (reference was made to ss. 228, 229, 230, 231 and 232), and finally the two amendments, to ss. 8 and 231 of that Proclamation by Proclamations No. 43 of 1942 and No. 14 of 1944 respectively. The first ground of appeal is that the requirements of s. 231 of the Proclamation of 1938, as amended, were not complied with. The effect of the amended section is that the court may proceed on the evidence of an accomplice or accomplices, but there has to be evidence aliunde of the cause of death. So it is submitted that in this case the Crown had to prove by independent evidence, other than that of the accomplices, that the deceased was in fact murdered. The requirements of the proviso to s. 231, as amended, cannot be satisfied by the evidence of an, or any, accomplice. This case comes from Swaziland, but in all respects material for the present purpose the law is precisely the same as that of Basutoland, and the effect of the decision of the Board in *Lerotholi* v. *The King* (1)—a case from Basutoland—was first that, so far as the construction of the amended proviso to s. 231 is concerned, the earlier decision of the board in *Tumahole Bereng* v. *The King* (2) still stands; and secondly, that the cautionary rule as stated in *Rex* v. *Baskerville* (3) should not be applied in Basutoland, but that the cautionary rule which should be followed is that laid down in the South African case, *Rex* v. *Ncanana* (4).

In *Tumahole's* case (2) the Board interpreted the expression "the single evidence of any accomplice" in s. 231 of the Basutoland Proclamation as meaning, not "the evidence of "a single accomplice," but "the unsupported evidence of "any accomplice or accomplices," and the first question here is whether that construction was correct. It is submitted that it was, and here it was not proved by evidence other than that of the accomplices that the offence charged had been actually committed. Under s. 231 there are two distinct stages, first, it has to be considered whether there is evidence to satisfy the proviso, and secondly, after that stage has been passed, and not until then, the court has to decide whether it will accept the evidence of the accomplices. Provided that there is evidence aliunde that the crime has been committed, then it is open to the court to act on accomplice evidence, provided that there is the warning by the judge to himself or a jury about the danger of acting on uncorroborated accomplice evidence. If it is the evidence of a co-accomplice it cannot be evidence such as to satisfy the requirements of the proviso.

With regard to the authorities, the view taken in *Rex* v. *Thielke* (5), that the evidence of two accomplices was sufficient to warrant a conviction, has since been honoured in the courts in South Africa. The greater part of *Rex* v. *John* (6) is con-

(1) Ante p. 11.
(2) [1949] A. C. 253.
(3) [1916] 2 K. B. 658.
(4) (1948) 4 S. A. L. R. 399, 405.
(5) (1918) S. A. L. R. (A. D.) 373.
(6) [1943] S. A. L. R. (T. P. D.) 295.

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cerned with the application of the cautionary rule. *Thielke's* case (1) was not cited to the Board in *Tumahole's* case (2), but *Rex* v. *John* (3) was. It does not appear that the authorities cited by the Attorney-General for the High Commission Territories before the Board in *Lerotholi's* case (4) give any further assistance on the question of the construction of the proviso to s. 231. Before *Thielke's* case (1) the proper interpretation of a similar proviso in the South Africa Acts gave rise to a great difference of judicial opinion in South Africa. The construction adopted by the Board in *Tumahole's* case (2) differs from the view now taken in the South African courts. Where there is an ambiguity of this sort in which it appears that the legislature has failed to make its meaning plain, the benefit of the doubt on the construction which ought to be placed on the section ought to be given to the accused person: *Royal Crown Derby Porcelain Co., Ld.* v. *Russell* (5); *Rex* v. *Chapman* (6). *Lerotholi's* case (4) left this question of construction open. The Board is not bound by its own previous decisions, but it is extremely reluctant to overrule them—I do not put it higher than that. It is submitted that *Thielke's* case (1) was wrong. Although that case was not before the Board when *Tumahole's* case (2) was considered, nonetheless this is purely a question of construction of a statute, and the matter was very fully considered by the Board. It is open to the Board in such a case as this to look back at the history of this legislation and the purpose for which the section was passed. What the legislature had in mind was to protect any accused person from being convicted on the evidence of accomplices. The effect of the section is much the same as if in this country the jury always acted on the warning given to it.

It is submitted that " the single evidence of an accomplice " covers more than one accomplice, and that it was not, and could not have been, the intention of the legislature by enacting those words to exclude the operation of the ordinary cautionary rule. Before the accused can be convicted on accomplice evidence it must be confirmed in some material particular, or else evidence other than that of the accomplice must be called to show that the offence has actually been committed. In either case the accused is given some measure of protection.

(1) (1918) S. A. L. R. (A. D.) 373.
(2) [1949] A. C. 253.
(3) [1943] S. A. L. R. (T. P. D.) 295.
(4) Ante p. 11.
(5) [1949] 2 K. B. 417.
(6) [1931] 2 K. B. 606.

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Assuming the submission on the construction of the proviso to be wrong, there are the following additional grounds of appeal: the trial judge failed to give himself and the assessors any or any sufficient direction as to the danger of accepting accomplice evidence which is uncorroborated by independent evidence. In *Lerotholi's* case (1) a good deal was said about the difference between the English and South African practice in regard to the cautionary rule, but it is submitted that there is not a great deal of difference. In each case it is a rule of practice, and in each case it appears from the authorities that the judge either has to warn himself or the jury of the danger of acting on accomplice evidence without corroboration. If he decides that there is no corroborating evidence, he then has to consider whether, taking into account the danger of which he has fully warned himself, he would still be justified in convicting the accused.

The next ground of appeal is that evidence of the independent witnesses on which the trial judge relied was not evidence implicating the appellants in the offence, and the judge therefore misdirected himself and the assessors in holding that such evidence could be accepted as corroboration. Further, none of the independent witnesses even purported to implicate appellants Nos. 5 and 6. Lastly, no note appears on the record to show the agreement or disagreement of the assessors with the decision of the judge, and the requirements of s. 8 of the Proclamation of 1938, as amended, were not therefore fulfilled. The omission to comply with that provision is more than a mere irregularity: compliance is an essential step in the proceedings; it does not matter what form it takes. The convictions of the appellants were wrong and should be quashed.

Gahan and *J. G. Le Quesne* for the Crown. On the construction of the material section, s. 231, the Crown relies on the framework of the Proclamation and the setting in which the section appears. Beginning with s. 207, which is the first of a group of sections headed " Competency of Witnesses," the only case that does not come within s. 207 is where the accused does not apply himself to give evidence. An accomplice is a competent witness. In s. 230 it is difficult to read the words " the single evidence of any competent and credible " witness " other than as a reference to one witness; and the submission is that that shows that what is meant in s. 231 is the evidence of one accomplice. Hitherto no one appears to have suggested that in *Thielke's* case (1) the law was wrongly interpreted. If on no part of the case is the judge dependent on the evidence of one accomplice only, then this section does not in any way affect him in his decision. If there are two accomplices, the section does not apply in its amended or unamended form. In the Cape of Good Hope, in the Transvaal, in Swaziland until 1938, and in s. 285 of the Union Act, South Africa, No. 32 of 1917 (corresponding to s. 231) there was a provision that the court could convict on the single evidence of any credible witness, except in perjury, and there was provision also for the case of an accomplice; the court had to be satisfied other than by the single unconfirmed evidence of such accomplice that the crime had actually been committed. Section 231 has been interpreted in South Africa under the relevant legislation as providing that a second accomplice is competent evidence to prove the crime, and in the present case each of the two accomplices on which the judge relied proved the commission of the crime and the participation in it of every one of the appellants. [Reference was made to *Rex* v. *Sethren* (2) and to *Thielke's* case (1).] In the second proviso to the unamended section " accomplice " cannot mean " accomplices," because the legislature has used the two words, and it is submitted that in the opening part of the section " accomplice," unless there is something which compels a different construction, must mean the same as in the second proviso—the singular. In 1944 Swaziland re-adopted the South African model without change.

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(1) Ante p. 11.

It must be conceded that *Tumahole's* case (3) laid down that a reference to the old legislation indicates that the plural is intended. It is submitted that the plural was not intended in the opening words. The determination of the whole appeal in *Tumahole's* case (3) depended on the construction of the opening words and then the transfer of that construction to the proviso. There is nothing in this legislation to displace the reading that " single evidence " refers to the evidence of only one accomplice. When that interpretation has been adopted by the highest court in the Union of South Africa and has been accepted as the settled law for twenty years, and then that provision was adopted in Swaziland, the inference at the very lowest is that it cannot have been the intention to depart from the earlier interpretation which did apply in Swaziland: see *Barras* v. *Aberdeen Steam Trawling and Fishing Co.* (1), where it was said that their Lordships could not avoid attributing to the legislature, when it used words identical with those which had been judicially construed, an intention to use the words in the sense in which they had been so construed.

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(1) [1918] S. A. L. R. (A. D.) 373, 377.

(2) (1915) S. A. L. R. (T. P. D.) 257, 260.

(3) [1949] A. C. 253.

The opening words of s. 231 were not changed by the change in the two provisos in 1944: South African law is the basis of the legislation. The proper construction of this section involves the reading of the opening words as referring to the evidence of one accomplice and one only, and that involves the submission that *Tumahole's* case (2) gave a misconstruction of the section. The Board is now invited to overrule it, and to say that in Swaziland the construction as held in South Africa has been adopted. The Board has power to overrule its own decisions: *Read* v. *Bishop of Lincoln* (3); *Attorney-General for Ontario* v. *Canada Temperance Federation* (4). It is very desirable that the interpretation in South Africa should apply throughout the Protectorates.

It was said for the appellants that any doubt on construction should be resolved in their favour. When, however, the matter is examined on the proper material there is really no doubt as to the meaning of the section; and, secondly, that principle has no application when the court is construing a section concerned with the powers of the court. The judge here was entitled to convict on the evidence of two accomplices whose evidence he accepted, each of them proving the commission of the crime and the participation of all the appellants in it. Having regard to all the circumstances, the proper inference is that the body would not have been where it was found, and in the condition in which it was found, unless it had been the body of a murdered man.

With regard to the assessors, the only statutory provision is to the effect that their agreement or disagreement with the judge's decision shall be noted on the record. It has been noted on the record, it is submitted, if it appears from the record whether they agreed or disagreed with the decision of the judge. Here the judge makes it quite clear that he consulted the assessors and that all were of one mind in the matter. There was here a sufficient compliance with the

(1) [1933] A. C. 402, 442.
(2) [1949] A. C. 253.
(3) [1892] A. C. 644, 654.
(4) [1946] A. C. 193, 203.

statutory requirements. In any case, there is nothing in the point on which the Board would hold that the case is within the rule on which it acts in criminal cases.

Dingle Foot in reply. It is not disputed that it is open to the Board to dissent from its previous decision, but it is something which it is extremely reluctant to do: *Ridsdale* v. *Clifton* (1), and those considerations apply a fortiori in a criminal case. A very heavy burden lies on the Crown in such circumstances as the present to satisfy the Board that its earlier decision was erroneous. *Thielke's* case (2) decided the point in South Africa for the time being, but it is submitted that it does not really come within the class of decision to which Lord Russell of Killowen was referring in *Barras'* case (3). It is not possible to derive much help from the latter case, and the Board has to decide, without very much actual assistance, what the section actually means. In s. 231 in 1938 the legislature were endeavouring to put into the form of a Code what is in substance the English law. If that be right, it does throw a good deal of light on the proper interpretation of the section, and " single evidence of an accomplice " must mean the plural, and there would still be the need for corroboration in some material particular. There have been four different interpretations placed on this section: (i.) that which was urged on the Board in *Tumahole's* case (4)—that the section was never intended to apply where there are two or more accomplices; (ii.) that which was placed on it by the Board in *Tumahole's* case (4)—the effect of the judgment was that there must be, in addition to the accomplice evidence, however many of them, independent evidence which satisfies the court that the offence charged has actually been committed; (iii.) the view which was taken by Innes C.J. in *Thielke's* case (2)—he said in effect that there were three ways of satisfying the requirements of the section; and (iv.) the view taken by Solomon J., in his dissenting judgment in *Thielke's* case (2)—he said that there were two ways in which the requirements of the sections can be satisfied. *Rex* v. *Sethren* (5) was held in *Thielke's* case (2) to have been rightly decided.

For the appellants here to succeed the Board must upset *Thielke's* case (2), and say that certain other cases in the Cape

(1) (1877) 2 P. D. 276, 305.
(2) [1918] S. A. L. R. (A. D.) 373.
(3) [1933] A. C. 402, 442.
(4) [1949] A. C. 253.
(5) (1915) S. A. L. R. (T. P. D.) 257.

were correct. There have always been these differences of view, and there is thus clearly considerable ambiguity which, it is submitted, should be resolved in favour of the accused. If *Tumahole's* case (1) and the view of Solomon J. in *Thielke's* case (2) are right then the appeal should succeed. There is no evidence aliunde that the offence was actually committed; the legislature had in mind throughout, in 1938 and in 1944, the danger of acting on accomplice evidence, and that would be defeated if it were held that all these safeguards disappeared the moment more than one accomplice can be called.

Jan. 23. LORD PORTER announced that their Lordships would humbly advise His Majesty that the appeal should be dismissed, and that they would give their reasons later.

March 29. LORD PORTER, delivering their Lordships' reasons for dismissing the appeal, stated the facts and the evidence set out above, and continued: Though the evidence, other than that of the two accomplices, which was produced on behalf of the Crown, is consistent with their testimony and perhaps points to some slight extent to its truth, their Lordships do not think it is of sufficient weight to be used as satisfactory independent corroboration of their evidence. They therefore find themselves under the necessity of determining what, under the law administered in Swaziland, is the effect of evidence of the commission of a crime given by the mouths of two accomplices unsupported by any other testimony.

In this country the accepted doctrine is now summed up in *Rex* v. *Baskerville* (3), and it has long been recognized that it is unsafe to convict on the testimony of an accomplice or accomplices, that one accomplice cannot corroborate another and that a jury must have careful warning of these dangers, but that, if such warning is duly given, a jury is entitled to convict on the evidence of an accomplice alone. But where evidence is given and is sought to be relied on as corroborative of the testimony of an accomplice it is not enough if it shows that the accomplice told the truth in matters unconnected with the guilt of the accused person: it must not only show that a crime has been committed, but must also establish the connexion of the accused person with its commission.

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(1) [1949] A. C. 253.

(2) [1918] S. A. L. R. (A. D.) 373.

(3) [1916] 2 K. B. 658.

In South Africa the position is different: the provisions are statutory and begin with those contained in Ordinance 72 of the Cape of Good Hope, which was promulgated in 1830. The wording of that Ordinance substantially sets out the law as it has been administered under the Roman-Dutch system in South Africa since that date. Sections 9, 12 and 33 of the Ordinance of 1830 are in the following terms:—

"9. And be it further enacted and declared, that no "person shall in any criminal case, be incompetent to give "evidence, in respect of having been an accomplice, either "as principal or accessory, in the commission of any crime "or offence charged in the indictment, information, or "complaint under trial in such case."

"12. And be it further enacted and declared, that it "shall and may be lawful and competent for any court or "jury in any case which shall and may be lawfully tried by "such court or jury respectively, to convict any person "who shall be so tried before any such court or jury, of any "crime or offence charged in the indictment, information, "or complaint under trial on the single evidence of any such "accomplice as aforesaid [i.e., an accomplice either as "principal or accessory]: Provided always, that such "crime or offence shall by competent evidence other than "the single and unconfirmed evidence of such accomplice "be proved to the satisfaction of such court or jury respec"tively to have been actually committed."

"33. And be it further enacted and declared, that it "shall be competent for the court or jury, by which any "person prosecuted for any crime or offence, shall and may "lawfully be tried, except in so far as has been or shall be "herein excepted, enacted, and declared, respectively, "to convict such person of any crime or offence charged "in the indictment, information, or complaint under trial "on the single evidence of any competent and credible "witness: Provided always that it shall not be competent "for any such court or jury to convict any person of the "crime of perjury on the evidence of any one witness, "except in addition to and independent of the testimony "of such witness some other competent and credible evidence "as to the guilt of such person shall be given to such court "or jury."

So far as Swaziland is concerned, the history of the enactments dealing with accomplices is as follows: In 1893, after

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the Convention of 1890, the South African Republic assumed jurisdiction and continued to exercise it until, after the South African War, jurisdiction over the Transvaal and Swaziland was assumed by this country. So far as the Transvaal is concerned, provision for the admissibility and regulation of evidence was made by Proclamation No. 16 of 1902, in terms substantially the same as those contained in the Cape Ordinance of 1830, and in 1904, by Proclamation, the Roman-Dutch and statute law of the Transvaal was applied to Swaziland. It is not, however, necessary to set out the terms of that Proclamation since its relevant provisions were re-enacted by a further Proclamation of 1907. Section 2 is in the following terms : " The Roman-Dutch common law save in so far as " the same has been heretofore or may from time to time " hereafter be modified by statute shall be law in Swaziland " and all statute law which is in force in Swaziland immediately " prior to the date of the taking effect of this Proclamation " shall save in so far as the same is hereby amended or altered " or is inconsistent herewith or may hereafter be amended " or altered shall be the Statute Law of Swaziland."

This Proclamation was followed by the Criminal Procedure and Evidence Act of the Union of South Africa, passed into law in 1917, and as a Union Act binding in the Transvaal. Sections 260, 284, 285 and 286 of that Act are in the following terms :—

> " 260. Every person not expressly excluded by this " Act from giving evidence shall be competent and com- " pellable to give evidence in a criminal case in any court " in the Union, or before a magistrate on a preparatory " examination."
>
> " 284. It shall be lawful for the court or jury by which " any person prosecuted for any offence is tried, to convict " such person of any offence alleged against him in the " indictment, summons or charge, under trial on the single " evidence of any competent and credible witness :
>
> " Provided that it shall not be competent for any court " or jury—
>
> " (1.) to convict any person of perjury on the evidence " of any one witness, unless in addition to and independent " of the testimony of such witness, some other competent " and credible evidence as to the guilt of such person " is given to such court or jury ; or

"(2.) to convict any person of treason except upon the "evidence of two witnesses where one overt act is charged "in the indictment, or where two or more such overt "acts are so charged, upon the evidence of one witness "to each such overt act.

"285. Any court or jury which is trying any person on "a charge of any offence may convict him of any offence "alleged against him in the indictment, summons or charge, "under trial, on the single evidence of any accomplice:

"Provided that the offence has, by competent evidence, "other than the single and unconfirmed evidence of the "accomplice, been proved to the satisfaction of such court "or jury (as the case may be) to have been actually com-"mitted.

"286. Any court or jury which is trying any person on "a charge of any offence may convict him of any offence "alleged against him in the indictment, summons or charge, "under trial, in respect of and by reason of any confession "of that offence proved to the satisfaction of the court or "jury (as the case may be) to have been made by him, "although the confession is not confirmed by any other "evidence:

"Provided that the offence has, by competent evidence, "other than the single and unconfirmed evidence of such "confession, been proved to the satisfaction of the court "or jury (as the case may be) to have been actually "committed."

From 1917 until 1938 the criminal law as administered in Swaziland was governed by the terms of this statute, but in 1938 the Swaziland Criminal Procedure and Evidence Proclamation came into force. By s. 8 of that Proclamation, as amended by Proclamation 43 of 1942, it was provided that the presiding judge should sit with assessors and that the agreement or disagreement of such assessors with the decision of the judge should be noted in the record.

The further material provisions of the Proclamation of 1938 were in the following terms, and still remain in force save in one particular:—

"207. Every person not expressly excluded by this "Proclamation from giving evidence shall be competent "and compellable to give evidence in a criminal case in any "court in the Territory or before a District Commissioner "on a preparatory examination."

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"230. It shall be lawful for the court by which any "person prosecuted for any offence is tried, to convict "such person of any offence alleged against him in the "indictment or summons on the single evidence of any "competent and credible witness:

"Provided that it shall not be competent for any court—

"(1.) to convict any person of perjury on the evidence "of any one witness unless, in addition to and independent "of the testimony of such witness, some other competent "and credible evidence as to the guilt of such person is "given to such court; or

"(2.) to convict any person of treason except upon "the evidence of two witnesses where one overt act is "charged in the indictment, or, where two or more such "overt acts are so charged, upon the evidence of one "witness to each overt act.

"231. Any court which is trying any person on a charge "of any offence may convict him of any offence alleged "against him in the indictment or summons on the single "evidence of any accomplice:

"Provided that the testimony of the accomplice is "corroborated by independent evidence which affects the "accused by connecting or tending to connect him with the "crime:

"Provided further that such evidence shall consist of "evidence other than that of another accomplice or other "accomplices."

The one emendation was made by Proclamation No. 14 of 1944, which repealed the two provisos to s. 231 and replaced them by a single proviso and reads as follows:—

"1. Section two hundred and thirty-one of the principal "law is hereby amended by deleting the first and second "provisoes and substituting therefor the following proviso:—

"Provided that the offence has, by competent evidence, "other than the single and unconfirmed evidence of the "accomplice, been proved to the satisfaction of such court "to have been actually committed."

The result of the change was to annul the two provisoes which required proof of the commission of a crime similar to or, perhaps, stricter than that required in this country, and to return to the requisites which the law of the Union of South Africa demanded.

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In these circumstances, the appellants maintain (1.) that s. 8 of the Proclamation of 1938 as amended in 1942 has not been complied with, inasmuch as the agreement of the assessors had not been noted on the record; (2.) that on its true construction s. 231 as amended in 1944 allows, it is true, proof of the commission of a crime by an accused person on the evidence of a single accomplice, but only if the fact that a crime has actually been committed has been established by evidence other than that of the accomplice, and that for that purpose the evidence of another accomplice or other accomplices will not suffice.

(1.) So far as the first point is concerned, it is true that the presiding judge sat with two European and two Swazi assessors and that their concurrence was not formally noted on the record of the proceedings, but the judge in open court and in the presence of the assessors said in terms that they had all come to the conclusion that the accused were guilty of the crime with which they were charged. It is not even as if the judge was in any way bound by the opinions of the assessors. In Swaziland, as in India, he must form an independent opinion, and although he will be assisted and influenced by their opinions, he is not bound by them. Section 8 of the Swaziland Criminal Procedure and Evidence Proclamation says in terms that the assessors shall give their opinion and such opinion shall be considered by the court, but the decision shall be vested exclusively in the judge.

Nor, indeed, does the Proclamation impose on him the duty of seeing that the agreement or disagreement of the assessors is noted. It is a purely ministerial obligation left to be performed by the court officials, and its omission in a case such as the present, where their assent has been publicly proclaimed may, indeed, be an irregularity, but is not of such importance as to invalidate the conviction. The position is not, as was suggested, analogous to that in *Mahlikilili Dhalamini* v. *The King* (1). When that case was decided s. 8 (supra) enacted that the assessors should give their opinion and such opinion should be considered by the court. On that wording it was held that they must give their opinion in open court, and that their doing so was an essential element in its decision: compliance with the provision was not ministerial but obligatory. As a result of the decision in that case, however, the law has been changed, and all that is now required is, as indicated

(1) [1942] A. C. 583.

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above, that the agreement or disagreement of the assessors with the decision of the judge should be noted on the record.

(2.) The second problem has lately been considered by their Lordships' Board in two cases, the first *Tumahole Bereng* v. *The King* (1), and the second *Bereng Griffith Lerotholi* v. *The King* (2). In each case it was common ground that anyone charged with an offence might be convicted on the evidence of a single accomplice, but that if one accomplice only was called to prove the guilt of the accused, it must be proved to the satisfaction of the court that the crime had actually been committed. The Crown, however, contended that if two accomplices were called to establish the guilt of the accused, the section has no application ; the proviso is only brought into play where one accomplice, and one only, testifies to the accused person's part in committing the crime. In any case, they say, the commission of the crime can be established by the testimony of another accomplice inasmuch as his is competent evidence, and the commission of the crime will then be proved, if the evidence is believed, by competent evidence other than that of the single and unconfirmed evidence of the accomplice called to prove the guilt of the accused.

In *Tumahole's* case (1) this contention was rejected. The Board considered that " the single evidence of any accomplice " was not equivalent to " the evidence of a single accomplice," and that in enacting that an accused person may be thus convicted, the provision must be read as stating that the conviction, if based on accomplice evidence, whatever the number of accomplices testifying may be, is only permissible if the fact that the crime has been committed has been established by other than accomplice evidence. Apart from the conclusion which they reached on the construction of the Proclamation, their Lordships thought themselves bound to follow the cautionary rule which is to be found in English law and is set out in *Rex* v. *Baskerville* (3) that one accomplice cannot be corroborated by another, and that it was therefore unsafe to convict in *Tumahole's* case (1).

So far as corroboration comes into consideration, it has to be remembered that the principles to be applied are those of Roman-Dutch law as administered in South Africa, and it does not appear that when dealing with that case their Lordships were invited to regard, or in fact had before them, the principles applicable under that system of law to accomplice evidence, or had an opportunity of tracing the development of the various statutory enactments which prevailed from time to time in that country or the case law interpreting them.

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(1) [1949] A. C. 253.

(2) Ante p. 11.

(3) [1916] 2 K. B. 658.

In *Lerotholi's* case (1) a similar question came before the Board, but in that case there was independent non-accomplice evidence of the commission of the crime on which their Lordships felt they could rely, and they therefore found it unnecessary to resolve the problem now in issue. But the facts and arguments were much more fully stated and developed and the Board left open the question whether, having regard to the fresh material which had been adduced, *Tumahole's* case (2) rightly decided the construction to be placed on the relevant sections. They pointed out, however, that, inasmuch as the proper cautionary rule applicable in South Africa had not been brought to the notice of this Board in that case, it was almost inevitable that the English rule should have been adopted. In *Lerotholi's* case (1) the cautionary rule which is followed in South Africa was brought to the notice of the Board, and is set out in the wording used by Schreiner J.A. in *Rex* v. *Ncanana* (3) and quoted in *Lerotholi's* case (4). Their Lordships agree with the conclusion reached in *Lerotholi's* case (3) that the cautionary rule so stated is that binding in Swaziland as it was in Basutoland, and are satisfied that it should be held in this case as it was in *Lerotholi's* case (1) that it was present to the mind of the judge who convicted the appellants and was properly applied by him.

There remains the difficult and controversial question raised by the wording of the proviso to s. 231 as amended in 1944. Undoubtedly their Lordships must give a construction to the language used which differs from that adopted in *Tumahole's* case (2) if they are to uphold the conviction now under appeal. In ordinary circumstances they would be very slow to take this course. It is true that the Board does not act, as the House of Lords acts, on the strict rule that they are bound by a previous decision based on the same considerations. Nevertheless, as was said in *Read* v. *Bishop of Lincoln* (5), a decision on a given state of facts ought not to be reopened without the greatest hesitation, though the right to reopen is not confined to cases where some fresh fact was adduced which had not

(1) Ante p. 11.
(2) [1949] A. C. 253.
(3) (1948) 4 S. A. L. R. 399, 405.
(4) Ante p. 22.
(5) [1892] A. C. 644.

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been under consideration on the previous occasion. Still, the right to reopen remains, and from these observations it is apparent that the existence of some fresh material not communicated or, at any rate, not fully presented to the tribunal which heard and decided the earlier case is an element to be borne in mind when deciding whether that case should be followed or not.

From a perusal of the judgment in *Tumahole's* case (1) it is apparent that the history of the adoption and promulgation of the various statutes and proclamations dealing with the effect of the evidence of accomplices in South Africa was only partially put before the Board, and much material which has now been ascertained was not presented to their Lordships on that occasion.

The present case, therefore, is one in which fresh facts have been adduced which were not under consideration when *Tumahole's* case (1) was decided, and accordingly it is one in which, in their Lordships' view, they are justified in reconsidering the foundations on which that case was determined. No doubt the provisions of the relevant proclamation as amended in 1944 might have been expressed more clearly, but it has to be borne in mind that the language now employed follows in substance that which is found in the Ordinance of 1830 and has been used and repeated in South Africa from time to time without any material alteration since that date, with the single exception of the Basutoland and Swaziland Proclamations of 1938. In their Lordships' view it is significant that after six years the wording then used was deleted and the original Roman-Dutch form employed in the Cape was reverted to. It appears, indeed, that up to the year 1915 the contention now put forward on behalf of the Crown was by no means universally acceded to by the courts of the several States now forming part of the Union of South Africa and their adjacent territories: on the contrary, that maintained by the representatives of the appellants in some cases prevailed. But in 1915 in *Rex* v. *Sethren* (2), the Crown's construction was adopted in the Transvaal, and after the passing of the Act of 1917 this view was followed by the Appellate Court of the Union of South Africa in *Rex* v. *Thielke* (3). It is true that Solomon J. dissented, but the majority of the court supported the Transvaal interpretation, and from that day onwards a similar construction has always been put by the South African courts on the language used.

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(1) [1949] A. C. 253.

(2) (1915) S.A.L.R. (T.P.D.) 257.

(3) [1918] S.A.L.R. (A.D.) 373.

The position, therefore, is that the present form of words was made the law of the Transvaal by Proclamation No. 16 of 1902, and applied to Swaziland in 1904, and that under that regime *Rex* v. *Sethren* (1) declared that the evidence of two accomplices was sufficient to warrant a conviction. Subsequently the Act of 1917, which made the law of South Africa homogeneous, was passed and so became law in the Transvaal as part of the Union of South Africa and was in force in Swaziland inasmuch as the law of the Transvaal was there applicable. This state of affairs continued to exist until 1938, when the temporary change already referred to was made. Meanwhile the decision in *Thielke's* case (2) continued to control the application given in the Union of South Africa to the various relevant Ordinances: see *Rex* v. *John* (3).

Had this history of the origin and development of the force and effect attributed to accomplice evidence in South Africa been presented to their Lordships in *Tumahole's* case (4) with the fullness with which it was put before their Lordships in the present instance, it might well have influenced the members of the Board who sat in the first-mentioned case to come to a different conclusion.

Moreover, it does not appear that the other sections forming part of the formulae of the Proclamation of 1938 which dealt with the admissibility and sufficiency of evidence, and were left unaltered when s. 231 was amended, were brought to their Lordships' notice. For instance, s. 230 uses expressions similar to those found in s. 231. In the former section the wording is " the single evidence of any competent and credible " witness." and that expression must refer to the evidence of one single witness, and the necessity of so construing it is accentuated when the incompetence of convicting an accused man " on the evidence of any one witness " is spoken of in the first proviso. " The single evidence of any witness " in the enabling part of this section and the " evidence of any " one witness " in the proviso appear to be contrasted with " some other competent and credible evidence " in proviso (1.) and " the evidence of two witnesses " in proviso (2.). If, then, in s. 230 the phrase "the single evidence of any "competent and credible witness" means, as it appears to mean, the evidence of any one witness, it is difficult to attribute a different meaning to the phrase "the single "evidence of any accomplice." That expression should naturally bear the same meaning as the similar phrase used in s. 230 and be interpreted as the evidence of any one accomplice.

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(1) (1915) S. A. L. R. (T. P. D.) 257.

(2) (1918) S. A. L. R. (A. D.) 373.

(3) (1943) S. A. L. R. (T. P. D.) 295.

(4) [1949] A. C. 253.

Section 231 was recognized by the Board in *Tumahole's* case (1) as being capable of bearing more than one interpretation. It is, as they say, sufficiently difficult and ambiguous to justify the consideration of its evolution in the statute-book as a proper and logical course. Unfortunately, they had not before them the full facts concerning that evolution which are now in the possession of the Board and therefore failed to construe it in the sense which a fuller knowledge of the circumstances requires.

In these circumstances their Lordships are of opinion that they are justified in placing an interpretation on the section which is required by the information now before the Board, and would hold that the Crown's contention is right and that the evidence of two accomplices is sufficient, if believed and if due warning of the danger of accepting it be borne in mind, to warrant the conviction of those accused of a crime. In the present case those conditions were fulfilled: due warning of that danger was present to the mind of the judge and his assessors and the evidence of the accomplices was believed.

Their Lordships have accordingly humbly advised His Majesty to dismiss the appeal.

Solicitors: *Barrow, Rogers & Nevill; Burchells.*

(1) [1949] A. C. 253.

Applied. ROGERS v. HYDE
[1951] 2 K. B. 923

Dictum of LORD REID, at p. 437, *applied.* ROGERS *v.* HYDE. [1951] 2 All E.R. 79.

[HOUSE OF LORDS.]

H. L. (E.)*

1950

Feb 7. 8. 13. 14. 15; *Mar.* 29

BAKER . . . . APPELLANT;

AND

TURNER . . . . RESPONDENT.

Considered. HA
WARD *v.* MARSHAL
[1952] 1 Q.B. 8

Considered. HAY-
WARD *v.* MARSHALL
[1952] 2 Q.B. 89

Landlord and tenant—Rent restriction—Tenancy of whole house—One room sub-let furnished with joint use of another room—Recovery of possession by superior landlord—Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3.

Practice and procedure—Leave to appeal—Conditional stay of execution—Condition not fulfilled—Judgment executed—Right to appeal not abated.

In a dwelling-house subject to the Rent and Mortgage Interest Restrictions Act, 1939, the tenant sub-let a furnished bed-sitting room with use of kitchen. The landlord obtained an order for possession of the entire premises on the ground that after that sub-letting neither the part sub-let nor the part retained was let as a separate dwelling-house.

Held (*per* Lord Porter, Lord Normand, Lord MacDermott and Lord Reid, Lord Oaksey dissenting) (1.) that though the sub-tenant had been given a right to use the kitchen, this did not constitute a sharing on the part of the tenant, who retained the general control of it and accordingly continued to enjoy a separate dwelling, of which the landlord was not entitled to recover possession.

Neale v. *Del Soto* [1945] K. B. 144, distinguished.

(2.) That, though the bed-sitting room was sub-let furnished, it was conceded that, by reason of the sub-tenant's right of user of the kitchen, he did not occupy a separate dwelling, and accordingly, since the effect of s. 3, sub-s. 2 (*b*), of the Act of 1939 was that furnished lettings were only withdrawn from the protection of the Rent Restriction Acts if the letting was as a separate dwelling, the landlord was not entitled to recover possession of the part sub-let.

Barrell v. *Fordree* [1932] A. C. 676, distinguished.

On leave being given to the tenant to lodge an appeal to the House of Lords, a stay of execution was granted on conditions which were not complied with, so that the landlord obtained possession before the hearing of the appeal.

Held, that the right of appeal was not thereby abated.

Sun Life Assurance Company of Canada v. *Jervis* [1944] A. C. 111, distinguished.

Decision of the Court of Appeal (sub nom. *Turner* v. *Baker*) [1949] 1 K. B. 605, reversed.

**Present :* LORD PORTER, LORD NORMAND, LORD OAKSEY, LORD MACDERMOTT and LORD REID.

APPEAL from the Court of Appeal (Lord Merriman P., Asquith L.J., and Vaisey J.).

The facts, summarized from their Lordships' opinions, were as follows: The respondent, Robinson Turner (the plaintiff in the action) was the owner of a dwelling-house, No. 22 Inwood Avenue, Old Coulsdon, Surrey, which was built about 1935, and was not subject to rent control until 1939. Being a dwelling-house of which the rateable value did not exceed 75*l.* and not being otherwise excluded, it was brought within the scope of the Rent and Mortgage Interest Restrictions Act, 1939, by s. 3, sub-s. 1. It was a small bungalow comprising three rooms and a kitchen, bathroom and lavatory downstairs, with an attic upstairs. Before January, 1948, the landlord let it to C. L. Baker, the husband of the appellant, Kathleen Baker (the defendant in the action), on a weekly tenancy at a rent of 1*l.* 6*s.* 9*d.* a week. On January 6, 1948, the tenant died and the appellant, who was living in the house, succeeded to the tenancy and continued to live there. Shortly thereafter she offered accommodation to one Setter and his wife, and the offer was accepted. A rent book was given to him, which showed the sub-letting, which was lawful, consisted of a "furnished bed-sitting room, use "of kitchen" for a rent of 1*l.* 15*s.* 0*d.* a week from February 14, 1948.

The sub-tenant and his wife went into occupation of the bed-sitting room and, in accordance with an arrangement made with the tenant when negotiating the sub-tenancy, paid about 6*s.* a week for gas and 1*s.* 2*d.* a week for electric light in addition to the rent, using the kitchen in accordance with the terms of the agreement concluded between them. The tenant and the sub-tenant both purchased their own food separately and they normally cooked and ate their meals independently of each other in the kitchen.

The tenant's contractual tenancy was determined by a written notice to quit expiring on March 29, 1948, but the sub-tenancy subsisted, and at the date of the institution of the present action both the tenant and the sub-tenant resided in the house in conformity with the terms agreed between them.

On June 16, 1948, the landlord issued a plaint in Croydon county court for possession of the whole house or alternatively of the furnished room let to the sub-tenant, on the grounds that (i.) as the use of the kitchen was shared, neither the tenant nor the sub-tenant had a separate dwelling and therefore no part of the house as then divided continued to be a separate dwelling so as to afford to either tenant or sub-tenant the protection of the Acts; (ii.) that, in any case, the furnished room was no longer protected by the Acts inasmuch as (*a*) it was furnished, (*b*) its occupation was coupled with the use of the kitchen and therefore it was not a separate dwelling. The tenant was the sole defendant and the sub-tenant was not a party to the suit at any time.

The tenant claimed the protection of the Acts and maintained that nothing she had done deprived her of that benefit. As to the sub-tenancy, in the course of her evidence she said according to the notes of His Honour Judge Sir Gerald Hurst K.C.: " I said come and live with me and share home; pay " 35*s*. a week and so much a week for gas—use of bathroom " and kitchen . . . . They have the run of the place."

The judge on July 14, 1948, found in favour of the landlord and ordered possession to be given of the entire premises.

On February 17, 1949, the Court of Appeal dismissed the tenant's appeal, and on February 18, it gave her liberty to lodge a petition of appeal to the House of Lords, in the following terms: " . . . . and upon the defendant by her counsel " undertaking (1.) To pay the taxed costs of the appeal to " this court to the plaintiff's solicitors within two months of " the taxing master's certificate on their personal undertaking " to return the same if the appeal to the House of Lords be " successful; (2.) To prosecute the appeal to the House of " Lords with all reasonable dispatch; (3.) To pay her rent " promptly pending the said appeal. It is ordered that " execution upon the aforesaid judgment of the Croydon " County Court, in as far as it relates to possession of the " premises described therein only, be stayed pending the " hearing of the appeal to the House of Lords, with liberty to " the plaintiff to apply to this court to remove the stay in the " event of any breach of the defendant's undertaking. It is " further ordered that the defendant be at liberty to lodge " a petition of appeal to the House of Lords on the ground " that a question of public importance is raised by this appeal."

The landlord's costs were taxed at some 90*l*., the taxing master's certificate being given on June 24, 1949. On July 14 the tenant lodged her petition of appeal. On July 29 the

House of Lords gave her leave to prosecute the appeal in formâ pauperis and to dispense with printing. The tenant was unable to pay the landlord's costs, as ordered by the Court of Appeal, and on October 30 it removed the stay of execution, as from November 30, on the application of the landlord. It did not appear whether the Court of Appeal was informed at the time of this application, that the House of Lords had granted the tenant leave to proceed in formâ pauperis. The landlord proceeded to execution, and on January 16, 1950, the appeal being then set down for hearing by the House of Lords, he caused the tenant to be evicted and her furniture seized. Until the eviction she had continued to live in the house, which was not at any material time used otherwise than as dwelling accommodation.

Barry K.C. and *Caulfield* for the appellant tenant.

Michael Hoare for the respondent landlord.

Hoare [on a preliminary point]. It is submitted that the appeal is no longer competent on the following grounds. (*a*) There is no living issue or lis between the parties now that execution has been enforced. The order for possession has been executed and the landlord has obtained actual possession of the premises. This is the fait accompli and the litigation is finally concluded by process of law. There must be a living issue between the parties before the House will entertain an appeal: *Sun Life Assurance Company of Canada* v. *Jervis* (1). The whole basis of an appeal is destroyed if the money in dispute has in fact been paid under a judgment: *Metropolitan Real and General Property Trust Ld.* v. *Slaters and Bodega Ld.* (2). The tenant was put on conditions under which the judgment was properly enforced and once execution had given the landlord possession, he might lawfully re-let the premises. (*b*) There is no existing leave to appeal. The leave, on its true construction, was conditional on the tenant giving three undertakings and since she has not fulfilled them it was therefore withdrawn and, in the events which have happened, ceased to exist. The leave to appeal and the stay of execution were bound up together. Both were granted on the conditions referred to in the earlier part of the order. Further, the leave was expressly granted because of the public importance of the question raised, but since then the point

(1) [1944] A. C. 111.

(2) (1940) 57 T. L. R. 227.

has been resolved by the Landlord and Tenant (Rent Control) Act, 1949, ss. 7, 8 and 9.

LORD PORTER intimated that in the opinion of their Lordships the appeal was competent.

Barry K.C. for the tenant. Only one point of law arises, whether the tenant of a dwelling-house within the protection of the Acts loses that protection in respect of the whole premises if he sub-lets one or two rooms and at the same time gives the sub-tenant the right to share other accommodation in the dwelling-house. The relevant enactment is s. 3, sub-s. 1 of the Act of 1939, since the house in question was built about 1935. In the Court of Appeal it was erroneously assumed that the case depended on s. 12, sub-s. 2 of the Act of 1920, but under either section the problem is the same. The correctness of the decision in *Neale* v. *Del Soto* (1) and the cases following it is not challenged. It is conceded that, on account of the sharing of the kitchen, the sub-tenant has not a separate dwelling, but nevertheless the tenant who sub-lets has a separate dwelling. Even though the principle upheld in *Neale* v. *Del Soto* (1) be correct and a letting of one or more rooms in a dwelling-house, together with a personal right to share other living rooms therein does not constitute the letting of a separate dwelling, that principle does not apply to the tenant of a house let to him as a separate dwelling who subsequently sub-lets part of it and grants a personal right to his sub-tenant to share another part. That does not prevent him from remaining himself the tenant of a house let to him as a separate dwelling. He still remains the tenant of the shared room and the sub-tenant has only a personal right in it.

Thus, in the present case the tenant's grant to the sub-tenant of a right to use the kitchen was only the grant of a right in personam which did not diminish the legal interest enjoyed by the tenant. The tenant's right was different in quality from that of the sub-tenant. The tenant's rights derived from the landlord are greater in degree, for the sub-tenant may only use the kitchen for cooking or eating, but the tenant may use it for all purposes not inconsistent with the use conceded to the sub-tenant.

The fallacy of the opposing argument is that it fails to distinguish between a letting and a mere licence which only confers a personal right to use the premises. It assumes that

(1) [1945] K. B. 144.

the interest of the tenant is diminished by the grant of a licence to some other person to use part of his premises, but taking in a lodger would not diminish a tenant's interest in his holding. Here the whole of the house, previously unfurnished, was let to the tenant, in succession to her husband, as a separate dwelling-house. When the action was before the county court she was still living on the premises and using them as her home. No part of her domestic life took place outside them—eating, sleeping and leisure occupations. In the course of her tenancy nothing transpired which altered this. The mere fact of sub-letting one room and giving the sub-tenant the right to use the kitchen did not alter it. The tenant remained tenant although she had carved off one room.

The position with regard to that one room is a minor matter, but, even assuming that the tenant has lost her rights in it, she is still tenant of part of the house constituting a separate dwelling-house. The court must have regard to the nature of the letting and the status of the house at the time when the landlord seeks to recover possession: *Prout* v. *Hunter* (1). The letting to the tenant was a letting of a separate dwelling-house. The fundamental principle of the Acts is the protection of the person in occupation. If the house is let as a separate dwelling and so occupied by the tenant, the tenant is entitled to protection under the Acts, whatever be the use to which he is putting it provided it is not inconsistent with anything in the Acts.

In considering the tenant's position the tests are quite different from any to be applied in the case of persons to whom the tenant may have granted lesser rights. The appellant relies on s. 12, sub-s. 8 of the Act of 1920, which should be construed in her favour.

As to the sub-tenancy, since, in accordance with *Neale* v. *Del Soto* (2), it did not create a separate dwelling-house, the landlord cannot recover possession of it, for a dwelling-house let furnished is only withdrawn from the protection of the Acts by s. 3, sub-s. 2 (*b*) of the Act of 1939 if it is a separate dwelling-house: see the definition in s. 16, sub-s. 1 of the Act of 1933. It is conceded that the sub-let room was a dwelling-house bona fide let at a rent of which a substantial portion was attributable to the use of furniture: see s. 12, sub-s. 2 (i) of the Act of 1920. The landlord's contentions have no relevance to *Neale* v. *Del Soto* (2) or to any other decided case.

(1) [1924] 2 K. B. 736, 741–2. (2) [1945] K. B. 144.

Any reconsideration of that line of authorities would only affect the tenant so far as the furnished room was concerned. The Landlord and Tenant (Rent Control) Act, 1949, was passed to deal with the consequences of that decision and the position created by it. Though the tenant does not require to ask for it to be overruled she does not support it. [He referred to *Sharpe* v. *Nicholls* (1) ; *Cole* v. *Harris* (2) ; *Llewellyn* v. *Hinson* (3) ; *Curl* v. *Angelo* (4) ; *Skinner* v. *Geary* (5) ; *Wimbush* v. *Cibulia* (6) ; *Barrell* v. *Fordree* (7) ; *Leslie & Co. Ld.* v. *Cumming* (8) ; and *Haskins* v. *Lewis* (9).]

Caulfield following. From the mere fact that what is granted to the sub-tenant is not a separate dwelling-house it does not follow that what remains to the tenant is not a separate dwelling-house either. The interest of the sub-tenant is not equal in all respects to that of the tenant. On the relationship between the tenant and the sub-tenant, it is open to the former to grant similar rights to another sub-tenant or to six others. When, as here, the grantor starts with a legal interest, a right in rem, the mere grant of a personal right does not diminish at all his right in rem or detract from it. He is merely making use of one of the rights of the legal estate which he has from his lessor. The expression " separate " dwelling " cannot be divorced from the word " let." It is true that here there is attached to the grant of a licence to use the kitchen, a grant of an interest in land but it is not different in kind from any other licence : see *Wood* v. *Leadbitter* (10) and *Thomas* v. *Sorrell* (11). The proper test to be applied here is to see what was the position of the sub-tenant and whether that detracted from the letting to the tenant of a separate dwelling. The tenant has not done anything contrary to the terms of the tenancy.

Hoare for the landlord. In the events which have happened, the Acts at the material time no longer applied to this house or any part of it, though but for the sub-letting it would have been protected. The landlord relies on four propositions : (*a*) The question whether the Acts apply to a house as being a house " let as a separate dwelling " must be determined by reference to the status of the house at the time when the landlord institutes proceedings for possession and not by the relationship of the parties before the court: *Prout* v. *Hunter* (1). The point is whether or not the premises are protected by the Act and the question whether the Acts apply does not depend on whether the parties are landlord and immediate tenant. (*b*) The status of a house may be so altered as to remove the house from the protection of the Acts by something which the tenant has done and with which the landlord has had nothing to do. (*c*) The sharing by the tenant of a living room with any other person, whether the landlord or not, prevents the tenant from being tenant of a "house or part "of a house let as a separate dwelling" within the meaning of the Acts. Sharing affects status. (*d*) In any event, the landlord is entitled to possession of the single room sub-let furnished. But once an order is made against the tenant in this case, the landlord will have all he asks for, since the sub-tenant has gone out of occupation of his portion and will not contest the matter.

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(1) [1945] K. B. 382, 385, 387.
(2) [1945] K. B. 474, 478–9.
(3) [1948] 2 K. B. 385, 390.
(4) [1948] L. J. R. 1756.
(5) [1931] 2 K. B. 546.
(6) [1949] 2 K. B. 564.
(7) [1932] A. C. 676, 678.
(8) [1926] 2 K. B. 417.
(9) [1931] 2 K. B. 1.
(10) (1845) 13 M. & W. 838, 842.
(11) (1674) Vaugh. 330, 351.

The relevant statutory provisions are s. 3, sub-s. 1 of the Act of 1939, sch. I to the Act of 1933 (succeeding s. 5 of the Act of 1920 and s. 4 of the Act of 1923) and in the Act of 1920, s. 5, sub-s. 5, ss. 10 and 12, sub-s. 1 (*f*) and (*g*), sub-s. 2 (i), sub-ss. 6 and 8, and s. 15, sub-s. 1. This last section is particularly relied on as showing that the statutory tenant has only a personal right: see *Keeves* v. *Dean* (2).

The creation by the tenant of the sub-tenancy resulted in the sharing by the tenant with the sub-tenant of an essential living room (viz. the kitchen), so that when the action was brought neither the tenant nor the sub-tenant was at the material time in occupation of a house or part of a house "let as a separate dwelling." There was no exclusive possession of a whole dwelling. Since under the rule in *Neale* v. *Del Soto* (3) and the line of cases following it, the sub-tenant did not occupy a separate dwelling, the tenant had not a separate dwelling either, because she, just like the sub-tenant, only had a share of the kitchen. If A. shares with B., then B. shares with A. Therefore, once there is such a sharing as in the present case, each is deprived of the protection of the Acts for the same reason. Only the user of the kitchen need be considered, not the interest which each

(1) [1924] 2 K. B. 736.
(2) [1924] 1 K. B. 685, 690-1.
(3) [1945] K. B. 144.

party has in it. Something which is shared is not separate, even though there may be no basis of equality. The case is different from a mere sharing of the kitchen with a bare licensee (e.g. a lodger or someone living outside the tenant's house who is given a contractual right to use the kitchen for cooking). Such a person would not be sharing the dwelling. A licence to use the kitchen coupled with a leasehold interest in another part of the house is materially different from a bare licence not coupled with a leasehold interest. In the former case the occupier (here the tenant) loses possession if the sharing be appurtenant to a sub-tenancy.

The Acts are concerned with dwellers, and this is a sharing of the only kitchen in the house with someone dwelling within the structure. That prevents the structure or any part of it being a separate dwelling. If the original letting by the landlord had been a letting of all the rooms except one to the woman who is the present tenant, with the right to share the kitchen with the tenant of the other remaining room (the sub-tenant in this case), that could not have created a protected tenancy: see *Llewellyn* v. *Hinson* (1). There the landlord would have been creating precisely the situation which has been created here: see *Stevenson* v. *Kenyon* (2). The right to use the kitchen in common with the occupier of the remainder of the house would pass on an assignment of the sub-tenancy so long as it was contractual. The whole of the house lost its identity as a separate dwelling when the tenant changed its status by creating the sub-tenancy. If A. contractually binds himself to share a vital part of his house he alters the status of the house. After and because of the sub-tenancy the whole house was not let as a separate dwelling and so was not a dwelling-house to which the Acts applied.

In any event, the part of the house which was sub-let furnished was thereby taken out of the protection of the Acts: see s. 3, sub-s. 2 (*h*) of the Act of 1939, and *Barrell* v. *Fordree* (3). Further it was not a separate dwelling. The tenant by sub-letting it ceased to possess or occupy it and transferred it into the possession of a sub-tenant as a dwelling not protected. The sub-tenant was carrying on all the functions of living, not in that one room but in the room plus the kitchen, just as the same was true of the tenant.

(1) [1948] 2 K. B. 385.

(2) (1946) 62 T. L. R. 702, 704.

(3) [1932] A. C. 676.

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The landlord's contentions in this case are supported by ss. 8 and 9 of the Landlord and Tenant (Rent Control) Act, 1949, which assumes that the decision of the Court of Appeal in the present case was correct. [He referred to *Williams* v. *Perry* (1); *Phillips* v. *Hallahan* (2); *Gidden* v. *Mills* (3); *Leslie & Co., Ld.* v. *Cumming* (4); *Roe* v. *Russell* (5); *Ebner* v. *Lascelles* (6); *Haskins* v. *Lewis* (7); *Skinner* v. *Geary* (8); *Fordree* v. *Barrell* (9); *Barrell* v. *Fordree* (10); *Brown* v. *Draper* (11); *Brown* v. *Brash* (12); *Wolfe* v. *Hogan* (13); *Krauss* v. *Boyne* (14); and *Wright* v. *Macadam* (15).]

Barry K.C. in reply. The tenant's case is based on the broad proposition that nothing in the Acts themselves or in the authorities cited tends to the conclusion that a statutory tenant in occupation of a house let to him as a separate dwelling loses the protection of the Acts merely because he enters into such a sharing agreement as this with a sub-tenant or with anyone else. This is nothing in the nature of a joint tenancy which would give the parties equal rights in a house or part of a house.

A tenant may not be protected under the Acts, either because the letting is a furnished letting or a business letting or else because he is not in occupation. But, apart from that, no use to which he may choose to put the property will affect his position so long as he does not bring it outside the protective scope of the Acts. So long as he uses the place as a separate dwelling he is entitled to occupy it in accordance with the terms of the original tenancy. His right is not destroyed by the grant of a mere personal licence such as was given in this case. A statutory tenant is entitled to sub-let and he is not limited to sub-letting as a separate dwelling.

Nothing in the Acts gives the landlord the right to evict a tenant from the parts he has sub-let, provided that he continues to reside in the dwelling-house and has not altered its character as a dwelling-house. The fact that the room was sub-let furnished is immaterial, for though the Acts do not apply to a furnished letting (s. 3, sub-s. 2 (*b*) of the Act of 1939) it was still part of a house let as a separate dwelling-house within the definition of "dwelling-house" in s. 16, sub-s. 1 of the Act of 1933. But since the furnished room was not a separate dwelling the landlord is not entitled to recover possession of it. [He referred to ss. 3 and 4 of the Act of 1939, *Llewellyn* v. *Hinson* (1); *Vickery* v. *Martin* (2), and *Roe* v. *Russell* (3).]

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(1) [1924] 1 K. B. 936.
(2) [1925] 1 K. B. 756.
(3) [1925] 2 K. B. 713.
(4) [1926] 2 K. B. 417.
(5) [1928] 2 K. B. 117.
(6) Ibid. 486.
(7) [1931] 2 K. B. 1.
(8) Ibid. 546.
(9) Ibid. 257.
(10) [1932] A. C. 676, 681.
(11) [1944] K. B. 309.
(12) [1948] 2 K. B. 247.
(13) [1949] 2 K. B. 194.
(14) [1946] 1 All E. R. 543.
(15) [1949] 2 K. B. 744.

Their Lordships took time for consideration.

Mar. 29. LORD PORTER. My Lords, this is an appeal by the appellant (the defendant in the action) from an order of His Majesty's Court of Appeal (England) dated February 17, 1949, dismissing her appeal from the judgment of His Honour Judge Sir Gerald Hurst K.C., dated July 14, 1948, under which judgment was entered for the respondent (the plaintiff in the action) for possession of a dwelling-house known as No. 22 Inwood Avenue at Old Coulsdon in the County of Surrey. The facts as proved or admitted are not in dispute. The county court judge, following and extending the decision in *Neale* v. *Del Soto* (4), found that the agreement between tenant and sub-tenant resulted in a sharing of the kitchen and so prevented the tenant from retaining or the sub-tenant from acquiring a separate dwelling—neither was separate, each was enjoyed with mutual or at any rate shared rights over the kitchen. The Court of Appeal upheld this contention and, I think, also decided that, inasmuch as the bed-sitting room was let furnished, it was by that circumstance alone taken out of the protection of the Acts.

When the questions were argued in the Court of Appeal it was thought that the house came under old control, i.e., that it had been subject to the Rent Restriction Acts passed before 1939 and therefore that the determination of the question whether the bed-sitting room constituted a separate dwelling depended upon the true effect of s. 12, sub-s. 2, of the Act of 1920. It appears, however, that this was a mistake. The house actually was not built until about 1935 and therefore is subject to the provisions of the Act of 1939 and that only. But the error has no effect upon the question to be decided. It is true that s. 12, sub-s. 2, of the Act of 1920 has been repealed by sch. I to the Act of 1939, but by s. 3, sub-s. 1, of this later Act the principal Acts (i.e., the Acts of 1920 and

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(1) [1948] 2 K. B. 385.
(2) [1944] K. B. 679, 683.
(3) [1928] 2 K. B. 117, 126.
(4) [1945] K. B. 144.

1923) apply to every other dwelling-house (i.e., to every house not already subject to the earlier Acts) of which the rateable value does not exceed a prescribed figure. By s. 16, sub-s. 1, of the Act of 1933 " 'Dwelling-house' has the same meaning "as in the principal Acts, that is to say, a house let as a "separate dwelling or a part of a house being a part so let." "Dwelling-house" therefore means separate dwelling-house and the Act of 1939 applies, as by s. 12, sub-s. 2, of the Act of 1920 that Act applied, only to a house or part of a house let as a separate dwelling. So with respect to houses let furnished, s. 3, sub-s. 2 (*b*), of the Act of 1939 expressly provides that the principal Acts shall not apply "to any "dwelling-house bona fide let at a rent which includes "payments in respect of . . . . use of furniture."

The problem therefore is unchanged, though the question has now, as it turns out, to be decided in reference to a house subject to new and not to old control. But before the substance of the dispute is decided, a preliminary question has to be determined. It was contended on the part of the respondent that the right of appeal had lapsed on two grounds (1.) that leave to appeal to your Lordships' House had only been granted by the Court of Appeal on condition that the appellant gave three undertakings, that she had not carried out those undertakings, and that her conditional leave to appeal was therefore withdrawn, and (2.) that the learned county court judge's order for possession as affirmed by the Court of Appeal had been executed, the landlord had obtained actual possession of the premises and that in face of this fait accompli the case was finally concluded and done with.

As to (1.), I do not read the order of the Court of Appeal as bearing the meaning contended for by the respondent. It seems to me to make two separate provisions (*a*) to grant a stay of execution upon certain terms which have not been fulfilled, and (*b*) to give leave to appeal on a matter of public importance. It is the stay, not the leave to appeal, which is conditional, and the fact that the stay has ceased to operate is irrelevant to the continued existence of the right of appeal. Moreover, it is to be observed that the leave given is to lodge a petition of appeal, and it would be an odd result, even if it were a possible one, if a petition lawfully lodged to your Lordships' House, as has happened in this case, could be withdrawn without the leave of the House because some condition subsequent had not been fulfilled.

As to (2.), the argument that the appeal has abated because the judgment of the Court of Appeal had been executed would, I think, logically lead to the result that, whenever a stay had not been granted, a successful litigant, if sufficiently active and astute, could execute his judgment and so prevent the determination of any doubtful point of law, even in a case where an appeal lay as of right—e.g., from Scotland or Northern Ireland, from an appellate court to your Lordships' House—or from the High Court to the Court of Appeal.

The contention was sought to be supported by a reference to the cases of the *Sun Life Assurance Company of Canada* v. *Jervis* (1), and *Metropolitan Real and General Property Trust Ld.* v. *Slaters & Bodega Ld.* (2). But those cases gave rise to very different considerations. In the first the appellants were given leave to appeal on the terms that they would pay the costs as between solicitor and client in the House of Lords in any event and not ask for the return of any money ordered to be paid by the Court of Appeal. It followed that, win or lose, they would receive nothing, and consequently there was no actual living issue between the parties. In the present case, on the contrary, the appellant stands to gain any advantage which will accrue to her as the result of setting aside the order of the Court of Appeal and of the county court judge.

As to the second case, there was no dispute that the defendants owed a sum of money ordered by the court to be paid, but they applied under the Courts (Emergency Powers) Act, 1939, for a stay of execution and resulting postponement of payment. The learned judge, reversing the order of the Master, gave the plaintiffs leave to proceed to execution and also granted leave to appeal, but made no order staying execution. Before the appeal was heard the defendants paid all sums due under the judgment. In these circumstances, as the only remedy would have been to order the repayment to the defendants of a sum admittedly due and paid, the Court of Appeal held that the basis of the appeal was destroyed. But that decision depended in my view on the fact that the sum paid was admittedly due, and the only application before the court was for a temporary stay. If, as is the position in this case, the decision of the appellate court would have affected the substantive right of the parties, the decision would have been otherwise. The "lis" is not ended by the levying of execution or by the landlord obtaining possession of the house: he may have achieved his object by a mistaken decision which it is your Lordships' function to rectify. The preliminary point in my opinion fails, and accordingly the House is faced with the duty of determining whether the judgment of the Court of Appeal was right or not.

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(1) [1944] A. C. 111.

(2) (1940) 57 T. L. R. 227.

In the first place, then, it has to be decided whether a bed-sitting room, if let separated from the rest of the house but with a superadded right for the tenants to use the kitchen of the house of which it formed part, can constitute a separate dwelling, and further, whether, if it be not a separate dwelling, the remainder of the house which is not sublet has ceased to be a separate dwelling because certain rights have been granted over its kitchen.

My Lords, the effect upon the letting or subletting of a portion of a dwelling-house, which portion in itself constitutes a separate dwelling, of coupling the tenancy with a right to use other portions of the house in common with the landlord, has been frequently dealt with by the Court of Appeal. The main results of decisions may, I think, be tabulated as follows: (1.) A portion of a house which is let by a landlord to a tenant, even if in itself separate, ceases to be a separate dwelling or to be protected by the Acts if the terms of the letting contain a provision that the tenant shall have the right of using a living room belonging to the landlord: *Neale* v. *Del Soto* (1). (2.) To take away the protection of the Acts, the room over which rights are given must be a living room: a bathroom, lavatory or cupboard will not avail, but for this purpose a kitchen is a living room: see *Cole* v. *Harris* (2). (3.) Furthermore if a landlord lets two portions of the same house to two separate tenants, giving each a separate portion of the house of which he alone is in occupation, but at the same time grants to each tenant the joint use of other portions of the house neither tenant is in possession of a separate dwelling: *Llewellyn* v. *Hinson* (3). (4.) A portion of a house let with such right over other portions can be recovered by whoever lets it without being met by the defence of the Acts, because the portion which is let is not a separate dwelling: *Stevenson* v. *Kenyon*; *Kenyon* v. *Walker* (4). (5.) The material time at which it has to be determined whether the house is protected

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(1) [1945] K. B. 144.
(2) Ibid. 474.
(3) [1948] 2 K. B. 385.
(4) (1946) 62 T. L. R. 702.

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or not is the moment when action is brought: *Prout* v. *Hunter* (1), and *Remon* v. *City of London Real Property Co. Ld.* (2).

What has never been determined is whether the portion retained has ceased to be a separate dwelling-house because the sub-tenant has been granted a right of user over a living room in the retained portion. The question might have arisen in *Kenyon* v. *Walker* (3). In that case the use of the kitchen for cooking purposes only was granted by a tenant to a sub-tenant, and in spite of the limited nature of the use so granted it was held that no separate dwelling had been created and that the tenant could recover possession from his sub-tenant. At the same time, however, in *Stevenson* v. *Kenyon* (4), the landlord claimed possession of the whole house, but his ground for so doing was not that the house had been divided into two portions, neither of which was separate from the other, but because, as he alleged, the tenant was charging an excessive rent to his sub-tenant, and that under s. 4 of the Act of 1933 that fact gave the court jurisdiction to make an order for possession. In this claim he failed and also failed to recover that part which was sublet with rights over the retained portion, because he had claimed to be repossessed of the whole and not of a part of the house. Whether he could have recovered possession of the portion sublet was not in issue or decided, and no claim was made, nor the possibility envisaged, that the retained portion had itself ceased to be a separate dwelling.

I have refrained in this analysis from speaking of a sharing of the kitchen between the two parties, although that expression is frequently used in the relevant cases. The phrase is in my opinion inaccurate in expression and may give rise to inaccuracy of thought. A landlord, or for the matter of that a tenant, who sublets a portion of the house he occupies and gives a right to his tenant to use the kitchen, does not share his kitchen. He retains many rights which the tenant does not enjoy. One can illustrate the difference by taking a case where a tenant first lets one portion of his house to one sub-tenant with a right to use the kitchen and then another portion to another sub-tenant with a similar right. Unless his cooking facilities or other enjoyment of the kitchen were interfered with, the first sub-tenant would have no ground of complaint.

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(1) [1924] 2 K. B. 736.

(2) [1921] 1 K. B. 49.

(3) 62 T. L. R. 702.

But a sub-tenant would have no right to permit a third person to use the kitchen in any way, even though that third person were an occupier of another part of the house or were a tenant of the person enjoying the facility. The tenant continues to have general control of the kitchen, subject only to the rights he has granted: the sub-tenant has nothing but the rights which his landlord has given.

The position is to some extent complicated by the assertion that the so-called statutory tenant has only a personal right. This statement is made in the plainest terms in *John Lovibond & Sons Ld.* v. *Vincent* (1) following *Keeves* v. *Dean* (2). For the purpose for which it was used the expression was accurate enough: all it meant was that he had no interest which could be transmitted: it did not mean that his only right was to use the kitchen and that except for user he had no dominion over it. That the statement had no such meaning is clear from Scrutton, L.J.'s words in the latter case, where he says (3): "Parliament has certainly called him a tenant, "and he appears to me to have something more than a personal "right against his landlord. I take it that he has a right "as against all the world to remain in possession until he "is turned out by an order of the court, and that he could "maintain trespass against any person who entered the "premises without his permission." Such a right is, I think, inherent in the status of a statutory tenant and differs toto coelo from the right granted to a sub-tenant to use the kitchen for cooking or otherwise. It does not follow therefore that a statutory tenant has parted with his separate dwelling because he has given a right of user over his kitchen to a sub-tenant, even if it be conceded that the sub-tenant has not acquired a separate dwelling when the rooms let to him are coupled with a right to use the kitchen.

I have thought it desirable to make these observations to your Lordships because counsel for the appellant was content to accept the decision in *Neale* v. *Del Soto* (4) and the cases which followed its principles as being correctly decided. For the purpose of the present case I also am prepared to treat these decisions as right, more particularly as the law as therein decided has now been altered by the Act of 1949. But such an acceptance does not, in my view, make the position of the lessee in pari casu with that of the sub-lessee.

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(1) [1929] 1 K. B. 687.
(2) [1924] 1 K. B. 685.
(3) Ibid. 694.
(4) [1945] K. B. 144.

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For the reasons indicated above, the lessee in my opinion continues to have and enjoy a separate dwelling. With all respect to the view of the Court of Appeal, I do not assent to the conclusion that if A. shares his kitchen with B. and as a result B. has no separate dwelling, it must follow that A. on his part has no separate dwelling because he shares with B. The inevitability of the conclusion is, as I think, falsified because there is no true sharing and because in my opinion the rules of formal logic must not be applied to the Acts with too great strictness. As Scrutton L.J. has more than once pointed out, they must be viewed in the light of their aim and object, and it must always be remembered that the difficulty in construing them is enhanced by the fact that words and phrases apt to describe the relationship of a common law landlord and tenant one to another have been used without specific definition of another and statutory relationship, viz., that of a protected tenant or sub-tenant to his immediate, or perhaps remote, landlord.

Even, however, if he fails in this claim the respondent maintains that he is entitled to recover the bed-sitting room because it is let furnished and therefore outside the protection of the Acts. The exemption from protection is now contained in s. 3, sub-s. 2 (*b*), of the Act of 1939 which enacts that the principal Acts shall not apply to any dwelling-house bona fide let at a rent which includes payments in respect of the use of furniture. The principles at stake have been dealt with directly and indirectly in a number of cases, but it is, I think, enough to consider three only.

In the first, *Prout* v. *Hunter* (1), a house let unfurnished was sublet furnished and the tenancy was held to be unprotected and the landlord entitled to recover possession because the occupying tenant held under a furnished letting. In *Leslie & Co. Ld.* v. *Cumming* (2), the tenant had sublet not the whole, but part only of the house furnished, and it was held that the landlord could not recover the whole house because each part was a separate dwelling and only part was let furnished. It was further held that he could not even recover part, because his claim was to the whole. The third case, *Barrell* v. *Fordree* (3), is a decision of your Lordships' House. In that case the tenant had sublet furnished two portions of the house, of which she was a statutory tenant, as separate dwellings, she herself being tenant of the whole house unfurnished. In these circumstances the House adjudged that the head landlord could recover the two portions sublet furnished inasmuch as they had become separate dwellings and as such, being furnished, had lost the protection of the Act. In none of the three cases were the occupants of the divided portions of the houses granted any right over other portions —each part was strictly self-contained and in *Barrell's* case (1) the decision turned directly on the fact that the rooms sublet were separate dwellings. In the present case the facts are different. It is conceded on behalf of the respondent, and indeed strenuously argued, that the bed-sitting room is not a separate dwelling because it enjoys rights over the kitchen of the retained portion. In this set of circumstances it is said to be exempted from the protection of the Acts by reason of the terms of s. 3, sub-s. 2 (*b*), of the Act of 1939. In my view it is not. That sub-section exempts only a dwelling-house let furnished, and " dwelling-house " means a separate dwelling. Ex concessis the bed-sitting room is not a separate dwelling, and accordingly that sub-section has no application to it. The tenant could recover it because it is not a separate dwelling, but the landlord cannot recover it because it is not a separate dwelling, even though it has been let furnished.

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(1) [1924] 2 K. B. 736.

(2) [1926] 2 K. B. 417.

(3) [1932] A. C. 676.

In my view the landlord fails on both his contentions and I would allow the appeal with such costs in your Lordships' House and below as the leave to appeal in formâ pauperis permits, and declare that the landlord is not entitled to possession of the house or any part of it.

LORD NORMAND. My Lords, on the two preliminary objections to the competence of the appeal I agree with all that has been said by my noble and learned friend on the woolsack and I have nothing to add.

On the merits of the appeal there are two propositions to be considered. First it is said by the respondent that if at the date of the termination of the contractual tenancy of a house (within the statutory rateable value), the state of things is that a room is in possession of a sub-tenant who has also under his sub-tenancy agreement the right to use the kitchen of the house for cooking and eating meals, and the tenant is living in the rest of the house subject to the sub-tenant's right to use the kitchen, neither the tenant nor the

(1) [1932] A. C. 676.

sub-tenant has a house let as a separate dwelling-house within the meaning of the Acts. If that proposition is correct the Acts do not apply to the house or to any part of it. The second proposition is alternative to the first: it is that if the room sublet to the sub-tenant with the use of the kitchen is sublet furnished, that room at least is not within the protection of the Acts, either (*a*) because, under s. 3, sub-s. 2, coupled with s. 3, sub-s. 1, and sch. I of the Act of 1939, the Acts do not apply to a dwelling-house bona fide let at a rent which includes payments in respect of use of furniture so as to prevent the landlord from recovering possession, or (*b*) because the tenant has transferred and lost possession of the room under a sub-tenancy agreement without thereby letting it as a dwelling-house or part of a dwelling-house to which alone the Acts apply.

I shall consider these propositions in their order, and it will be convenient to approach the first and major proposition by dealing with two matters about which there is little controversy between the parties. In *Prout* v. *Hunter* (1), it was decided that the date at which the landlord seeks to recover possession is the relevant time at which to consider the status of the house as a protected dwelling-house or a non-protected dwelling-house, and if at that date there is a sub-tenant the status of the house as affected by the sub-tenancy is a material consideration. In that case the plaintiff had let a flat unfurnished to a tenant, who had furnished it and sublet it to a sub-tenant. The plaintiff gave his tenant notice to quit and thereafter brought an action against the tenant and sub-tenant to recover possession. The Divisional Court (2) held that proviso (i) of s. 12, sub-s. 2, of the Act of 1920, which enacts that the Act "shall not . . . . apply to "a dwelling-house bona fide let at a rent which includes "payments in respect of . . . . use of furniture" applied and that the plaintiff was entitled to possession.

This judgment was affirmed in the Court of Appeal. Bankes L.J. said (3): "It is argued that in s. 12, sub-s. 2. "the statute is dealing with the status of the house rather "than with the rights of the particular party to the litigation. "The Act is not to apply to a dwelling-house which is let "furnished. But at what time is its status of a furnished "house to be considered? It would seem that the material

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(1) [1924] 2 K. B. 736.

(2) Ibid. 365.

(3) Ibid. 741.

" time is when the landlord seeks to obtain possession. If " at that time the status of the house is that of a house let " as a furnished house it is immaterial that at some earlier " date its status was that of an unfurnished house." The rule laid down in *Prout* v. *Hunter* (1) has frequently been followed and it is accepted by the parties to this appeal.

The other matter relates to the sub-tenancy in such a case as this. In *Neale* v. *Del Soto* (2), Mrs. Del Soto sublet to a tenant two unfurnished rooms in a seven-roomed house of which she was lessee. The sub-tenancy agreement provided for the use by the sub-tenant jointly with the tenant of the garage, kitchen, bathroom, lavatory, coal-house and conservatory. The sub-tenant applied under s. 12, sub-s. 3, of the 1920 Act for an apportionment of the standard rent. The county court judge dismissed the application, holding that there was no letting of a separate dwelling-house to the sub-tenant. His order was affirmed by the Court of Appeal. Morton L.J. said (3) : " The real substance of the matter was " that there was a sharing of the house. Each party had " the exclusive use of some rooms and the two parties together " had the use in common of other rooms." In *Cole* v. *Harris* (4), however, it was held by a majority of the Court of Appeal that when the tenant had a lease of a bedroom, living room and kitchen together with the joint use with the landlord and another tenant of a bathroom and w.c. there was a letting of the three rooms as a separate dwelling-house and not a sharing of the whole house. Morton L.J., with whom MacKinnon L.J. agreed, after referring to *Neale* v. *Del Soto* (2) said (5) : " It is, however, a matter of great difficulty to " determine where the line should be drawn, so as to distinguish " between a ' sharing ' of a house and a letting of part of a " house as a separate dwelling," and he subsequently said (6) : " I do not think that the legislature intended that the sharing " of a w.c. with the landlord or with others should be sufficient " to prevent a letting of rooms from being a letting of part " of a house as a separate dwelling within the meaning of " the Acts." The test which he accepted is that it is not a sharing of the house when " the accommodation which is " shared with others does not comprise any of the rooms " which may fairly be described as ' living rooms ' or ' dwelling

(1) [1924] 2 K. B. 736.
(2) [1945] K. B. 144.
(3) Ibid. 147.
(4) Ibid. 474.
(5) Ibid. 483.
(6) Ibid. 485.

"'rooms'," and he added, "To my mind a kitchen is fairly "described as a 'living room,' and thus nobody who shares "a kitchen can be said to be tenant of a part of a house let "as a separate dwelling." Lawrence L.J. dissented; but his dissent was on the limited ground that a lavatory is an essential part of a dwelling-house. All the members of the court were agreed that "sharing" was a matter of degree, and that the sharing of accommodation not essential to a dwelling-house was immaterial. The only other case to which I need refer on this matter is *Llewellyn* v. *Hinson* (1). In that case two tenants had each of them exclusive possession of certain living rooms but they shared in common a kitchen, a bathroom and a w.c. It was held that neither was protected by the Acts since neither was a tenant of a house let as a separate dwelling or of part of a house so let. Asquith L.J., referring to *Neale* v. *Del Soto* (2) and the cases which followed it, said (3): "The gist of those decisions is that where what "the landlord under the agreement of tenancy parts with "to the tenant consists of two things (*a*) exclusive possession "of a room or rooms, plus (*b*) user, jointly with someone else, "of another room or other rooms which come under the "description of a living room or living rooms, then the tenant "cannot say that he is the tenant of a 'house let as a separate "'dwelling or part of a house being a part so let'." Counsel for the appellant did not challenge these decisions, which have lost their importance since the passing of the Landlord and Tenant (Rent Control) Act, 1949 (see ss. 7, 8 and 9). But they decide nothing about the position of a tenant of a house who sublets a room to a sub-tenant with right to use the kitchen. There is in the passage cited above from the judgment of Morton L.J. in *Cole* v. *Harris* (4), a sentence which apart from its context would apply to the position of the appellant as well as to that of the sub-tenant in this case. But the present question was not before the court and was not considered either in *Cole* v. *Harris* (5) or in any other of the cases. The statement cited above from the judgment of Asquith L.J. in *Llewellyn* v. *Hinson* (1) therefore states the effect of the cases with the appropriate limitation.

I turn now to the immediate question before the House. The argument for the respondent was not based on mere

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(1) [1948] 2 K. B. 385.
(2) [1945] K. B. 144.
(3) Ibid. 391.
(4) [1945] K. B. 485.
(5) Ibid. 474.

"sharing" and it distinguished the present case from a case in which either a lodger or someone living outside the tenant's house was given a contractual right to use the tenant's kitchen for cooking. The argument came to this: that when a sub-tenant must be held, under the rule established by *Neale* v. *Del Soto* (1) and the cases which followed it, not to have a house let as a separate dwelling, it necessarily follows that the tenant must be held not to have a separate dwelling, because he as much as the sub-tenant has but a share of the kitchen. It was this argument that was sustained by the Court of Appeal.

My Lords, the test which must be applied is the test prescribed by the Act itself: was the house, as occupied by the appellant, a house let as a separate dwelling? The conception of sharing may well have been helpful in considering the questions before the court in *Neale* v. *Del Soto* (1) and the other similar cases, yet it may prove misleading when it is used indiscriminately. It is not accurate to say that this kitchen was shared between the tenant and sub-tenant. If anything was shared it was the use of the kitchen, and the sharing of the use of a room is at best an inexact conception which may be serviceable in some cases but not in others. There are at least three differences to be noted between the tenant's and the sub-tenant's rights in relation to the kitchen, and these differences existed not only in the period between the grant of the sublet and the expiry of the notice to quit but also thereafter. First, the tenant continued to have every use of the kitchen for every purpose that did not prevent the sub-tenant from cooking and eating meals in it; second, the tenant could have granted the right to other persons to use the kitchen and the sub-tenant could neither have done this nor been entitled to object; third, the tenant continued to have the right to prevent the intrusion into the kitchen of strangers and trespassers, and no such right was conferred on the sub-tenant. These differences are differences of degree and kind, and are inconsistent with the conception of a sharing of the use of the kitchen between the tenant and sub-tenant. In spite of the sub-tenancy agreement the tenant remained in possession of the kitchen, and continued to occupy it as part of a house let to her as a separate dwelling-house.

The respondent answered these difficulties by submitting that nothing but the user of the kitchen should be considered.

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(1) [1945] K. B. 144.

That is, in my judgment, to ignore the statutory test whether the house is *let* as a separate dwelling-house. In *Wolfe* v. *Hogan* (1) the test of user per se was considered and rejected. The premises in that case were let as a shop, but subsequently the tenant used them both as a dwelling-house and as a shop. When the landlord sought to recover possession the tenant maintained that she was entitled to the protection of the Acts because there was no prohibition in the lease against the use of the premises otherwise than as a shop, and because they were at the time when the landlord sought to recover possession occupied by her as a dwelling-house. Evershed L.J. said (2): "'Let as a separate dwelling' must refer to the "subject of a contract of letting as a separate dwelling. If "it is to be shown that particular premises come within "that definition, prima facie, at any rate, as it seems to me, "it must be shown that the two parties to the contract have "let on the one hand and taken on the other the premises "in question as a separate dwelling. That may be shown "either by the terms of the bargain or it may be shown, "where one party has altered the user with the full knowledge "of the other, by that other party accepting the changed "position, so that you must again imply a mutual consensus "of the two parties to the contract in regard to the use." In the present case the tenant, when the landlord served his notice to quit, had the rights of occupation and possession which the lease gave her, save that she had parted with the right of possession and occupation of one room to her sub-tenant. Her contractual rights as regards the kitchen were not shared with her sub-tenant and her use of the kitchen was an exercise of her rights under her lease and not of rights partitioned or shared under the sub-lease. I would therefore hold that the appellant was still the occupier of a separate dwelling-house consisting at least of the whole house except the room sublet.

I think that the same conclusion may be reached from a consideration of the terms of sch. I, para. (*d*), to the Act of 1933. That paragraph empowers the court to make an order for recovery of possession of any dwelling-house to which the Act applies if "the tenant without the consent of the "landlord has . . . . sublet the whole of the dwelling-house "or sublet part of the dwelling-house, the remainder being "already sublet." The implication is that the court has no such power if a part of the dwelling-house is sublet without the landlord's consent provided that the tenant remains in occupation of the part not sublet. This implication was I think judicially affirmed in *Roe* v. *Russell* (1). There the sublet was a sublet of a separate dwelling-house, but a sublet of a non-separate dwelling-house is an exercise of a power to sublet and the word "sublet" in the paragraph is not qualified by the words "as a separate dwelling-house" or by words which have that meaning by definition. There seems to me to be no sufficient reason for reading into the paragraph this qualification and without it the tenant enjoys the same protection whether as a result of a sublease by him the sub-tenant has a dwelling "let as a separate dwelling-"house" or a dwelling that falls short of being "let as a "separate dwelling-house." If that is the correct view of the paragraph it is in accordance with what I think are the realities of the situation and the true position of the tenant after he has granted a sub-lease of a room with use of the kitchen or of another living room so long as he does not cease to occupy the dwelling-house except that part which he has sublet.

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(1) [1949] 2 K. B. 194.

(2) Ibid. 200.

The respondent's argument based on ss. 9 and 10 of the Landlord and Tenant (Rent Control) Act, 1949, that the legislature must be taken to have approved of the judgment of the Court of Appeal in this case appears to me to be without logical foundation. No such inference can be drawn from the cited sections. It may have been that Parliament thought that the Court of Appeal had erred in its construction and that it amended the Act so as to avoid the possibility of a repetition of the same construction. Or it may have been that Parliament thought that the Court of Appeal had correctly construed the Act and therefore that the Act stood in need of amendment. But it cannot be determined whether Parliament took the one view or the other.

The respondent's claim that he is entitled to an order against the appellant for possession of the single furnished room calls in the first instance for consideration of s. 3, sub-s. 2 (*b*) of the Act of 1939, which substantially re-enacts proviso (i) of s. 12, sub-s. 2 of the Act of 1920. So far as material to the present case s. 3, sub-s. 2 (*b*) of the former Act says that the principal Acts shall not apply to any dwelling-house bona fide let at a rent which includes payments in respect

(1) [1948] 2 K. B. 117.

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of use of furniture. But by s. 16, sub-s. 1 of the Act of 1933 "dwelling-house" unless the context otherwise requires "has the same meaning as in the principal Acts that is to "say a house let as a separate dwelling or a part of a house "being a part so let" and this definition is adopted by s. 7 sub-s. 1 of the Act of 1939 for the purposes of that Act. It follows from this that "dwelling-house" in s. 3 sub-s. 2 (*b*) means, unless the context otherwise requires, a "house let "as a separate dwelling or a part of a house being a part "so let." There is nothing in the context which requires a different meaning to be put on the word "dwelling-house," and since the respondent's claim in respect of the one room is made on the footing that it was not let as a separate dwelling-house, it cannot find any support in s. 3, sub-s. 2 (*b*). The fact that the room was let furnished is thus irrelevant, but there still remains the argument that the appellant by subletting it ceased to possess or occupy it and that she transferred it into the possession of a sub-tenant as a dwelling not protected by the Act, because it was not sublet as a separate dwelling-house. The question is whether the landlord can recover possession of the room while the tenant continues to reside in the remainder of the house as a separate dwelling-house. If, as I think, the sublet of a non-separate dwelling is an exercise of the power to sublet and within the powers which the Act contemplates that the tenant may exercise without prejudicing the protection which the Act gives him in respect of the entire dwelling-house, the answer must be that the landlord's claim to recover possession fails. It may appear anomalous that the landlord can recover possession of a part of a dwelling-house which the tenant has sublet furnished as a separate dwelling-house (*Barrell* v. *Fordree* (1)), but that he cannot recover possession if the sublet was of part of the dwelling-house furnished with use of a kitchen which was not sublet. On the other hand, the distinction between that kind of sublet and a letting of rooms to lodgers who are permitted to cook their meals in the kitchen must appear unreal to those most concerned. There are many who through shortage of houses and economic circumstances are forced to be content with something less than a home wholly their own and furnished with their own furniture. If they take a house furnished as a separate dwelling the Acts give them no protection. If they take from a landlord a lease of rooms, whether furnished or unfurnished, with a right to use a kitchen the Acts give them no protection. If they take a sublet of rooms with right to use the kitchen from a tenant in occupation of the remainder of the house as a separate dwelling-house, they have no protection under the Acts against the tenant, but I think they have a qualified protection against the landlord through the protection to which the tenant from whom they derive their rights is still entitled.

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(1) [1932] A. C. 676.

I would allow the appeal.

LORD OAKSEY. My Lords, I also agree with my noble and learned friend on the woolsack on the preliminary objections, but in my opinion the judgments of the Court of Appeal and of the county court judge were right and this appeal should be dismissed.

The question is whether the appellant, who was at the date of the summons a statutory tenant, was a person who "retains "possession of any dwelling-house to which" the Rent Restriction Acts applied within the meaning of s. 15 of the Act of 1920 (10 and 11 Geo. 5, c. 17), that is to say "a part "of a house let as a separate dwelling." At that date the appellant retained possession of the house originally let to her husband by the respondent, except one room which the appellant had sublet furnished with the right to use another room, viz., the kitchen, jointly with herself.

The appellant does not challenge the correctness of any of the decisions on these Acts, and it is therefore necessary to consider the few which are directly relevant. In *Neale* v. *Del Soto* (1), the Court of Appeal decided that a tenant who rented two unfurnished rooms together with the use, jointly with his landlord, of other accommodation including the kitchen was not in possession of a separate dwelling-house, and in *Llewellyn* v. *Hinson* (2), where two tenants, having exclusive possession of certain rooms in a flat, shared the kitchen, a bathroom and a w.c., they were held not to be in occupation of separate dwelling-houses.

In spite of these decisions, which are unchallenged, it is argued for the appellant that, although a sub-tenant who shares the use of the kitchen with his landlord (the tenant) does not occupy a separate dwelling, yet the tenant who shares the use of the kitchen with the same sub-tenant does

(1) [1945] K. B. 144. (2) [1948] 2 K. B. 385.

occupy a separate dwelling. This argument is, I understand based on the view that the tenant's rights are different in quantity and quality from those of the sub-tenant. The tenant's rights are derived, so it is argued, from the head landlord, and they are, or may be, greater in quantity or degree, since the sub-tenant only has the use of the kitchen for cooking, and possibly for eating, whereas the tenant may use it for any purposes not inconsistent with the use conceded to the sub-tenant. With the greatest respect to those of your Lordships who take a different view, I think that these considerations have nothing whatever to do with whether the dwelling in the room is separate. The words "separate" and "dwelling" do not appear to me to have any reference to legal interests or to the quantity or degree of enjoyment. If a bedroom is occupied by two persons, one in a bed and the other on the floor, it does not appear to me to be used as a separate bedroom by the one in the bed any more than by the one on the floor.

As to the quality of the rights, I think the rights of both the tenant and the sub-tenant are derived from the same Acts and from nowhere else, though it is true that the Acts adopt to a certain extent the terms of the tenancy and sub-tenancy agreements: see the Rent Restriction Act of 1920, s. 15.

It has been suggested that the position of lodgers creates difficulty in the interpretation which I put on the words "separate dwelling," but lodgers and persons residing with a statutory tenant are expressly referred to in the Acts (cf. Act of 1933, sch. I, para. (*b*)). Moreover, lodgers are not in the same position as sub-tenants, and can never acquire the statutory rights which the Acts confer upon sub-tenants. The position of lodgers has therefore in my view no bearing on the meaning of the words "separate dwelling" in the Acts.

On the subsidiary question whether the respondent is entitled in any event to an order for possession of the room let furnished by the appellant, I am also of opinion that the order of the Court of Appeal is right. The appellant's counsel contends that, since the Acts have no application to the sub-tenancy agreement because, as he concedes, it did not create a separate dwelling, the respondent cannot recover possession of the furnished room sublet on the ground that it is let furnished. But unless the Acts confer some protection upon the appellant in respect of this room, the respondent, having given notice to quit in accordance with the terms of the tenancy agreement, is entitled at common law to possession of any part of the house not protected by the Acts, whether furnished or not.

LORD MACDERMOTT. My Lords, before the creation of the sub-tenancy the bungalow was let and used as a separate dwelling, and by reason of this and of its rateable value was a dwelling-house to which the Acts applied, being what is sometimes termed a "new control" house, that is to say, a house first brought within those Acts by the Act of 1939. The subletting was lawful and the sublet bed-sitting room, if a dwelling-house within the meaning of the Acts, was a dwelling-house bona fide let at a rent of which a substantial portion was attributable to the use of furniture; in short, a furnished letting for the purposes of the Acts. After the subletting, and until evicted under the order for possession the appellant continued to live in the bungalow, which was not at any material time used otherwise than as dwelling accommodation.

At the beginning of the hearing before your Lordships, Mr. Hoare, for the respondent, submitted that the appeal was no longer competent. Mr. Hoare advanced two points in support of his contention. First, he said there was no longer a lis. The respondent having regained possession of the premises in dispute, there was, he argued, no living issue between the parties such as must exist before this House will embrace an appeal, and he cited *Sun Life Assurance Company of Canada* v. *Jervis* (1). And, secondly, he submitted that the order of the Court of Appeal giving leave to appeal was conditional and that, in the events which had happened, such leave no longer existed.

My Lords, both these points are, in my opinion, without substance. As to the first, the decision referrred to has nothing to say to the facts of this case. I express no opinion as to what the appellant's precise position will be if she succeeds in this appeal; but that her rights must be affected by a favourable decision cannot be doubted. There is nothing in the present situation to make inapplicable the general rule that if a successful party chooses to execute on foot of a judgment which is under appeal, he does so at his peril and

(1) [1944] A. C. 111.

without thereby obtaining any right to halt an appeal then proceeding according to law. The second point was based on the view that the last paragraph of the order of the Court of Appeal was subject to the triple undertaking which is recited immediately before the penultimate paragraph and has not been fully complied with. This is an impossible construction. The last paragraph is a separate and distinct part of the order, not only grammatically but of necessity. Once a petition of appeal is lodged for the consideration of this House it is not, I apprehend, for the Court of Appeal to control the proceedings upon it. The order seems to me to have been drafted with this in mind; and, apart from that, it is not possible to annex to leave to *lodge* a petition of appeal a condition such as that relating to the payment of rent pending the appeal, which could not, of course, be fulfilled until after the lodgment.

I come, then, to the merits of the appeal. It is agreed that the enactment immediately in point is s. 3, sub-s. 1, of the Act of 1939. By that sub-section, when read with the definition of " dwelling-house " in s. 16 of the Act of 1933, the Acts of 1920 to 1933 are made applicable, subject to the modifications prescribed by sch. I to the Act of 1939, to this bungalow if " let as a separate dwelling," or to a part of it " being a " part so let." The issues for determination are whether, when the contractual tenancy ended on March 29, 1948, the appellant was, by virtue of the Acts, entitled to retain possession of either the whole bungalow or the whole bungalow less the room sublet. It is perhaps well to observe at this stage that no question arises as to the terms and conditions applicable to a statutory tenancy of the bungalow. Though s. 15, sub-s. 1, of the Act of 1920, was much canvassed before your Lordships, it only deals with the rights and obligations of the tenant who retains possession under the Acts. It is therefore not directly relevant here, for the subletting was made during the contractual tenancy and the real question is whether the appellant ever became entitled to hold over as a statutory or protected tenant. It is common ground that had the appellant not made the subletting she would have been so entitled. What is urged against her is that after and because of the subletting, the whole bungalow or, alternatively, the room sublet, was not let as a separate dwelling and was therefore not a dwelling-house to which the Acts applied.

Before going further it is necessary to refer to the nature of the main argument on which these contentions are founded, for it has been accepted by the courts below to an extent which breaks new ground in what is by now a much cultivated field. It consists of two propositions. The first but states a principle laid down by a group of Court of Appeal decisions, the most important of which are *Neale* v. *Del Soto* (1), *Sharpe* v. *Nicholls* (2), *Cole* v. *Harris* (3), and *Llewellyn* v. *Hinson* (4). I need not deal with the facts of these cases save to say that they related to a particular type of letting, namely, a letting of part of a dwelling-house by which the tenant obtained exclusive possession of one or more rooms with the use, jointly with his landlord or some one else, of some other part or parts of the house.

The question raised—I think for the first time in *Neale* v. *Del Soto* (1)—was whether such a letting was a letting of part of a dwelling-house as a separate dwelling, and thus of a dwelling-house within the meaning and protection of the Acts. The principle applied by the Court of Appeal in answering this question appears sufficiently from the following passages in two of the judgments. In *Cole* v. *Harris* (5), Morton L.J. says: "I think that the true test, where the "tenant has the exclusive use of some rooms and shares "certain accommodation with others, is as follows: there "is a letting of part of a house as a separate dwelling, within "the meaning of the relevant Acts if, and only if, the accom-"modation which is shared with others does not comprise any "of the rooms which may fairly be described as 'living rooms' "or 'dwelling rooms.' To my mind a kitchen is fairly "described as a 'living room,' and thus nobody who shares "a kitchen can be said to be tenant of a part of a house let "as a separate dwelling."

Then in *Llewellyn* v. *Hinson* (6) which applied this doctrine to cases in which the joint user was by the tenant and some one other than his landlord, Asquith L.J., delivering the judgment of the court, states the principle thus: "This court "cannot consider whether *Neale* v. *Del Soto* (1) and its satellite "cases were properly decided. It can only inquire what they "in fact decided. About this there can in our view be little "doubt. The gist of those decisions is that where what the

(1) [1945] K. B. 144.
(2) Ibid. 382.
(3) Ibid. 474.
(4) [1948] 2 K. B. 385.
(5) [1945] K. B. 474, 485.
(6) [1948] 2 K. B. 385, 391.

" landlord under the agreement of tenancy parts with to " the tenant consists of two things (*a*) exclusive possession " of a room or rooms plus (*b*) user, jointly with some one else, " of another room or other rooms which come under the " description of a living room or living rooms, then the tenant " cannot say that he is the tenant of a ' house let as a separate " ' dwelling or part of a house being a part so let.' The ratio " decidendi is that the ' dwelling ' of the tenant on the facts " assumed consists of the totality constituted by (*a*) plus (*b*) : " and that part of the totality is not ' separately ' let to him, " because the possession or user of it is to be shared by him " with another : a state of affairs which is inconsistent with " the word ' separately ' and, indeed, with the word ' let ' " for both of these terms connote exclusive possession or " enjoyment."

Such is what I may call the *Del Soto* (1) doctrine which was adopted by the respondent as his first proposition. Before coming to his second it will be well to interpolate a reference to the Landlord and Tenant (Rent Control) Act, 1949, as ss. 7 to 10 thereof (inclusive) were obviously enacted to counter the wide-spread and important consequences of that doctrine. Section 7 deals with cases where a tenant shares accommodation with his landlord, and s. 8 with cases where a tenant shares accommodation with persons other than his landlord. Section 9 relates to sub-tenancies and provides, inter alia, that no part of the tenant's premises shall be treated as not being a dwelling-house to which the Acts apply by reason only " (*a*) that the terms on which any person claiming under " the tenant holds any part of the premises include the use of " accommodation in common with other persons." This Act was passed on June 2, 1949, but s. 10 gives the sections already mentioned a retrospective effect, " but not so as to " affect . . . . anything done or omitted " during any period before the commencement of the Act. These are difficult words; but it is unnecessary to dwell on them, as it was conceded that the order for possession in this case came within the expression " anything done." That being so, I need not consider the scope of ss. 7, 8 and 9 or say more than that, as I read them, they leave it open to this House to review the *Del Soto* (1) doctrine should occasion to do so arise.

The respondent's second proposition was to this effect. If a tenant sublets part of his dwelling on sharing terms of the *Del Soto* (1) type so that both tenant and sub-tenant share some part of the dwelling, such as the kitchen, which may be fairly described as living or dwelling accommodation, then the tenant can no longer be said to hold what is excluded from the sub-demise as a separate dwelling. That, taken with the first proposition, of which it was said to be a necessary consequence, comes to this. Once a tenant " shares " living accommodation with a sub-tenant in this way, each must stand deprived of the protection of the Acts for the same reason ; what A. shares with B., B. shares with A. and, therefore, neither has a separate dwelling.

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(1) [1945] K. B. 144.

These propositions were then applied in this manner. They were linked together and used to strip the entire bungalow of the protection of the Acts. Alternatively, if the second was ill-founded, the first remained and sufficed, it was contended, to justify an order for possession limited to the sublet bed-sitting room. This alternative claim was also supported on another and distinct ground, which may be conveniently mentioned here. The bed-sitting room as a furnished letting was, the argument proceeded, outside the scope of the Acts by virtue of s. 3, sub-s. 2 (*b*), of the Act of 1939 and could not, therefore, be withheld by the appellant, having regard to the decision of this House in *Barrell* v. *Fordree* (2).

The *Del Soto* (1) doctrine was not challenged before your Lordships on behalf of the appellant, and the debate proceeded throughout on the basis that the sublet bed-sitting room had not been let as a separate dwelling and accordingly was not at any time a dwelling-house within the meaning of the Acts. The respondent's first proposition was thus, if not conceded, at least not disputed. His second proposition, however, was vigorously contested, as was his application of the first to the alternative claim. I will revert to the *Del Soto* (1) doctrine later. Meantime I assume its validity for the purpose of considering the contentions of the parties.

I start therefore with the respondent's second proposition. The view of the Court of Appeal appears to have been that it flowed logically from the first. With all respect I am unable to agree. I appreciate that where the sharing is between two tenants of the same landlord it may well be that if the test laid down in *Cole* v. *Harris* (3) applies to one of the tenants it must apply to the other. But where the sharers are tenant

(1) [1945] K. B. 144.
(2) [1932] A. C. 676.
(3) [1945] K. B. 474.

and sub-tenant the matter seems to me to stand on quite a different plane. The word "sharing" is then only appropriate in a colloquial sense. There is no balance or equality of rights in respect of what is shared. The sub-tenant has but a right of user; the tenant, on the other hand, remains tenant of the entirety of his kitchen or whatever the shared room is. He may keep others out of it—at least to the extent of those he has not undertaken to admit. He may decorate and refurnish it. He may be liable to keep every part of it in repair. In short, he remains in possession subject, at most, to whatever right of user he has granted to others. In such circumstances to say that, because the sub-tenant, by the kind of arrangement under discussion, has got what is not a separate dwelling, the separate dwelling which the tenant has had let to him must have ceased to be separate in whole or in part is, I think, a complete non sequitur. I can see nothing in the ratio of the *Del Soto* (1) doctrine to require such a result. That doctrine was directed to the determination of the character of what has been *let* to the person granted a right to share. If part of the living accommodation as demised to him is not to be enjoyed by him exclusively, then he has not been let and is not tenant of a separate dwelling. That reasoning cannot, however, be applied as a matter of course to the position of the person granting the right to share, for the facts regarding him and his tenancy need not be the same and will generally be quite different. Here they are essentially different, for what was let to the appellant was the bungalow as a separate dwelling with the right to possession of the entirety—a right which, by reason of the subletting, was lost only as regards the bed-sitting room.

If then, as I would hold, the respondent's second proposition cannot be derived from the *Del Soto* (1) doctrine, it remains to inquire whether the act of subletting a part of the bungalow as dwelling accommodation, but not so as to constitute a separate dwelling, has diminished the protection from eviction which the appellant would otherwise have been entitled to under the Acts.

It is, in my opinion, not open to doubt that a tenant who lawfully sublets a part of his house as a separate dwelling remains entitled to the protection of the Acts in respect of his entire holding. That seems to follow from *Roe* v. *Russell* (2), and to be the necessary effect of para. (*d*) of sch. I to the Act of 1933 and s. 7, sub-s. 1, of the Act of 1923. The former of these provisions, when read with s. 3 of the Act of 1933 and sch. I. to the Act of 1939, in effect provides, as respects new control houses, that no order for possession of a dwelling-house to which the Acts apply shall be made unless the court considers it reasonable so to order and—" (*d*) the tenant " without the consent of the landlord has at any time after " September 1, 1939, assigned or sublet the whole of the " dwelling-house or sublet part of the dwelling-house, the " remainder being already sublet."

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(1) [1945] K. B. 144.

(2) [1928] 2 K. B. 117.

Section 7, sub-s. 1, of the Act of 1923 does not apply to new control houses, but it is nevertheless relevant to the point now under consideration, for it shows, I think clearly, what the policy of the legislature was in this regard. I need not set out the sub-section in extenso. Suffice it to say that it provides, inter alia, that a statutory tenant may be made liable to an additional increase of rent in respect of his *entire* holding " where part of a dwelling-house to which the principal " Act applies is lawfully sublet, and the part so sublet is " also a dwelling-house to which the principal Act applies . . . ."

Now that provision is in terms restricted to a sub-tenancy which constitutes a separate dwelling, but I do not think the language used can be said to suggest that a statutory tenant cannot sublet dwelling accommodation which is not separate in this sense. What then of para. (*d*) which I have just quoted ? Does its reference to the subletting of a part include the subletting of a part which is not in itself a dwelling-house ? Even if this paragraph is to be read as relating to the subletting of dwelling accommodation only, it cannot in my opinion be restricted to the subletting of separate dwellings as, if it were, it would not apply at all (on the present hypothesis) where a whole house was, by a succession of sublettings, parcelled out to sub-tenants, with the last having a right to use the kitchen. And if this is so, the right to sublet short of the entirety which the paragraph plainly recognizes ought not, in my opinion, to be so restricted either. I do not see anything in this to offend the policy of the Acts or to conflict with any of their provisions. On the contrary I think s. 5, sub-s. 5, and s. 15, sub-s. 3, of the Act of 1920 indicate that a tenant may (in the absence of any stipulation to the contrary) sublet with impunity a part which is something less than a separate dwelling, for they both save " any sub-

" tenant to whom the premises or *any part thereof* have been " lawfully sublet " in the event of the tenant's interest coming to an end. Had the legislature intended to refer to a part which was also a separate dwelling, it is but reasonable to assume that it would have said so, as it has in clear terms in s. 7, sub-s. 1, of the Act of 1923, and s. 4, sub-ss. 1 and 4 of the Act of 1933.

For these reasons I am of opinion that a tenant who lawfully sublets a part of his holding which, though dwelling accommodation, falls short of being a separate dwelling within the meaning of the Acts, does not thereby lose the protection of those Acts in respect of any part of the dwelling-house comprised in his tenancy.

I therefore conclude that the respondent's main contentions are unsupported either by the *Del Soto* (1) doctrine or the relevant legislation. This means that the part of the bungalow which was not sublet was protected, and also, if I am right in my reasoning that the *Del Soto* (1) doctrine affords the respondent no right as against the appellant to the recovery of the part which was sublet. But the position as to that part also involves the further contention which was founded upon the furnished nature of the subletting and the decision in *Barrell* v. *Fordree* (2). If that contention is to succeed it must be by virtue of s. 3, sub-s. 2 (*b*), of the Act of 1939 which provides that, subject to certain immaterial exceptions, the Acts shall not apply " to any dwelling-house bona fide " let at a rent which includes payments in respect of . . . . " use of furniture." On the assumption, however, that the *Del Soto* (1) doctrine applies, the subletting was not of a dwelling-house, and s. 3, sub-s. 2 (*b*), and *Barrell* v. *Fordree* (2) are alike inapplicable. This further submission cannot, therefore, succeed.

On these grounds I am of opinion that if the *Neale* v. *Del Soto* (1) doctrine is applied the respondent's claim must fail in its entirety.

My Lords, thus far I have assumed the correctness of that doctrine. This has been a convenient procedure having regard to the course of the argument ; and the appeal may properly be decided upon it in view of the fact that the parties have been at one in accepting the subletting as not that of a separate dwelling. But the validity of the doctrine has not been debated and it is possible—I do not say more—that its effect has not been entirely neutralized for the future by the Act of 1949. I do not, therefore, express any final opinion regarding it. Nor do I state any conclusion as to the true construction of s. 12, sub-s. 8, of the Act of 1920 which relates to the letting of rooms in a dwelling-house and has, perhaps, never received as much attention in this connexion as it deserves.

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(1) [1945] K. B. 144.

(2) [1932] A. C. 676.

For the reasons already mentioned I would allow the appeal as regards the whole bungalow, with costs here and in the courts below.

LORD REID. My Lords, the main question in this case is whether the fact that the Setters were sharing the use of the kitchen under this agreement entirely deprives the appellant of the statutory right to retain possession of the house, after the end of the contractual tenancy, which she would otherwise undoubtedly have had. The statutory protection does not apply if the subject of which the owner seeks to obtain possession is not a "dwelling-house." "Dwelling-house" is defined as follows by s. 16, sub-s. 1, of the Act of 1933: "'Dwelling-house' has the same meaning "as in the principal Acts, that is to say, a house let as a "separate dwelling or a part of a house being a part so let." I do not refer to s. 12, sub-s. 2, of the Act of 1920, because that sub-section does not apply to a house brought under control by the Act of 1939, but there is no material difference between that sub-section and the definition which I have quoted.

The respondent's case is that in June, 1948, when this action was brought the house was not "let as a separate dwelling" because it or at least an essential part of it was being shared with the Setters. The words "let as a separate dwelling" are difficult to interpret, but one or two points are now clear. In the first place it is the state of things when the action is brought that matters. Secondly, "let" is not limited to a letting under a contractual tenancy. It has long been settled that the Rent Acts do not prevent an owner from terminating the tenancy of his tenant in the ordinary way: what they do is to give to a person who has been tenant a right to remain in possession after the tenancy has gone. A person with such a right is commonly called a statutory tenant, but that name, though convenient, is inaccurate. The true position of such a person was stated as long ago as 1923 by Bankes L.J. in *Keeves* v. *Dean* (1): " . . . . he is not a tenant at all; although " he cannot be turned out of possession so long as he complies " with the provisions of the statute, he has no estate or interest " in the premises such as a tenant has." It follows that, as a main purpose of the Rent Acts is to confer a statutory right to possess after the end of a contractual tenancy, the word " let " must be interpreted in a sense wide enough to include subjects held or possessed by virtue of that right. The question at issue may therefore be stated in this way: was the house on June 15, 1948, held or possessed by the appellant as a separate dwelling?

It is perhaps easier to say what is not a separate dwelling than to say what is one. In *Neale* v. *Del Soto* (2) the owner of a house, in addition to letting two rooms to a tenant, gave him the right to share the use of other rooms including the kitchen. In *Llewellyn* v. *Hinson* (3) the landlord let certain rooms to one tenant and other rooms to another tenant and in addition gave to each of them the right to share in the use of the kitchen. In these cases it was held that no separate dwelling had been let. I have no doubt that these decisions are correct. If a tenant has to share with another person a living room which is not let to him, it is in my view impossible to find anything which is let to him as a separate dwelling. It cannot be the let rooms plus the right to use the other room, because that other room is not let to him at all—he is only a licensee there. And it cannot be the let rooms alone, because his having to share another room shows that the let rooms are only a part of his dwelling place. It follows that the subjects let to Setter were not let to him as a separate dwelling and that he did not become a statutory tenant. But I think that quite different considerations apply when the tenant has no right or need to go beyond the subjects let to him, but chooses to share the use of a part of those subjects with someone else. I do not think that it is possible to say that a tenant who agrees to share his house with lodgers or other licensees thereby ceases to possess his house as a separate dwelling. No doubt the words " separate dwelling " in an appropriate context might mean the dwelling place of a separate or single family or household, but it is to my mind clear that that is not their meaning in the Rent Acts.

(1) [1924] 1 K. B. 685, 690.
(2) [1945] K. B. 144.
(3) [1948] 2 K. B. 385.

The Acts recognize that a tenant may sublet or take in lodgers e.g., the Act of 1933, sch. I (*b*)). I leave aside for the moment the question of subletting. I can find nothing in the Acts, or in any authority of which I am aware, to suggest that a tenant who lives in the house can cease to hold it as a separate dwelling merely because he has agreed to share it, or some part of it, with licensees. Such sharing might take many forms. On the one hand, a lodger might act and be treated as a member of the tenant's own family. On the other hand lodgers might keep aloof from the tenant and his family and be given a right to the exclusive use of the kitchen at certain times of day. I can find nothing to suggest that one such form of sharing has different legal consequences from another. Indeed the tenant may devote the greater part of his house to the use of lodgers without ceasing to hold the whole house as being let to him as a separate dwelling. In *Vickery* v. *Martin* (1) a tenant who made a business of taking in paying guests and devoted the greater part of the house to that purpose did not lose the statutory protection. If the Setters, instead of having a sub-lease of their bed-sitting room, had been lodgers or licensees, they might have had precisely the same right to share the use of the kitchen but that sharing would certainly not in my view have impaired the appellant's statutory protection. Why should it be different because Setter had a sub-lease of the bed-sitting room instead of a licence to use it ?

It was argued that a licence to use the kitchen coupled with a leasehold interest in another part of the house is materially different from a licence not coupled with a leasehold interest. But at the time when this action was brought there was no longer any leasehold. The appellant had no power to create a sub-tenancy to endure beyond her own tenancy, and that came to an end on March 29, 1948. I cannot find any difference in quality between a right to share accommodation enjoyed by one who was formerly a sub-tenant and still has an exclusive right to occupy another part of the house, and a similar right enjoyed by one who has no such exclusive right which would justify the one but not the other being held to prevent a statutory tenant from holding her house as a separate dwelling.

I turn now to the other element in the case, the fact that Setter was originally sub-tenant of the furnished bed-sitting room and was still in exclusive occupation of that room when

(1) [1944] K. B. 679.

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this action was commenced. It was argued that, even if the appellant succeeded on the main question because sharing the kitchen did not deprive the appellant of her whole protection, yet the facts that the bed-sitting room was sublet to Setter, and that he had no statutory tenancy, took the bed-sitting room out of the appellant's separate dwelling and entitled the respondent to recover possession of it. The question of the application of the Rent Acts to subletting is not an easy one and I shall try to confine myself to those aspects of it which are relevant to the present case, but in view of an argument founded on the decision of this House in *Barrell* v. *Fordree* (1) it is necessary to go considerably beyond the facts of this case.

There is no doubt that the appellant was entitled, during her contractual tenancy, to sublet a part of her house. In fact she sublet so that the sublet part was not let as a separate dwelling. But she could have sublet so that the sublet part was let as a separate dwelling. In that case the sublet part would have been a "dwelling-house" within the meaning of the Acts. It must then have come within the scope of either s. 3, sub-s. 1, or s. 3, sub-s. 2, of the Act of 1939. If it fell within s. 3, sub-s. 1, the sub-tenant would at the end of his contractual tenancy have had the ordinary rights of a statutory tenant: but if for example it had been let furnished and therefore fell within the scope of s. 3, sub-s. 2 (*b*), the Acts would not apply to it. *Barrell* v. *Fordree* (1) was decided on the proviso to s. 12, sub-s. 2, of the Act of 1920. That sub-section does not apply to the present case, but there is no material difference between it and s. 3, sub-s. 2, of the Act of 1939. In *Barrell* v. *Fordree* (1) the tenant had sublet parts of her house to two sub-tenants and there was no sharing of accommodation. Those parts were sublet furnished. It was never suggested that the parts sublet were not let as separate dwellings. They were treated throughout as "dwelling-houses" within the meaning of the Acts, and as they were let furnished, they were by virtue of s. 12, sub-s. 2, dwelling-houses to which the Acts did not apply. Accordingly, after the contractual tenancies were terminated, there was nothing to prevent the owner of the property from recovering possession of them.

As I read it, the decision of this House was based entirely on the fact that the sublet parts were dwelling-houses to which the proviso to s. 12, sub-s. 2, of the Act of 1920 applied. But neither that proviso nor the corresponding provision in the Act of 1939, s. 3, sub-s. 2 (*b*), applies to anything which is not a "dwelling-house." The words of s. 3, sub-s. 2, are quite clear: "The principal Acts shall not, by virtue of this "section, apply . . . . (*b*) save as is expressly provided in "the said Acts, as amended by virtue of this section, to any "dwelling-house bona fide let at a rent which includes "payments in respect of board, attendance or use of furniture." I think that it is impossible to interpret "dwelling-house" in this context as having a meaning wider than that given to it by the definition in s. 16, sub-s. 1, of the Act of 1933. Section 3, sub-s. 2, of the Act of 1939 is in effect an exception from s. 3, sub-s. 1, and "dwelling-house" must have the same meaning in the two sub-sections. "Dwelling-house" in s. 3, sub-s. 1, cannot have a meaning wider than the definition, because to give it a wider meaning there would extend the whole system of rent control to some unspecified class of houses not included in the definition.

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(1) [1932] A. C. 676.

For the reasons already stated, the room sublet to Setter was not a "dwelling-house" within the meaning of the Rent Acts, and therefore neither s. 3, sub-s. 2, of the Act of 1939 nor the decision in *Barrell* v. *Fordree* (1) is of any avail to the respondent in this case. If he is to succeed it must be on some other ground. There is no provision in the Acts which expressly applies to the present case but, as I understood it, the argument for the respondent was that the Acts only protect a tenant who is in possession, and that a tenant who has sublet a part of his house, being no longer in possession of the sublet part, can derive no benefit from the Acts with regard to that part. It is true that a tenant who has wholly given up possession of his house loses his statutory protection, but it does not necessarily follow that a tenant who has retained possession of and continues to live in part of the house will lose his protection for the rest of the house which he has sublet. The Act of 1933 provides in sch. I, para. (*d*), that a court has power to make an order for recovery of possession if the tenant has "assigned or sublet the whole of the dwelling-"house, or has sublet part of the dwelling-house, the remainder "being already sublet," that is to say, if he has parted with possession of the whole house. This general provision, by

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omitting the case when the tenant has retained possession of part of the house and sublet the rest, clearly distinguishes it. It does not prevent an order for recovery of possession in such a case if, as in *Barrell* v. *Fordree* (1), the circumstances bring it within some other provision of the Acts which warrants such an order. But it does I think indicate that the mere fact that a part of the house is sublet is not enough, and I can find nothing else in the present case to warrant the order which the respondent seeks. For these reasons I think that the respondent has no right to resume possession of the sublet room. I therefore agree that the appeal should be allowed.

Appeal allowed.

Solicitors : *Beaumont, Son & Rigden ; Kinch & Richardson, for A. Rawlence, Croydon.*

(1) [1932] A. C. 676.

[PRIVY COUNCIL]

J. C.*

1950

May 3

BASMA . . . . APPELLANT ;

AND

WEEKES AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

Contract—Sale of house—House owned by three tenants in common—One tenant without power to contract—Purchaser named in agreement agent for known principal—Sufficient memorandum to satisfy Statute of Frauds—Specific performance against two vendors in respect of their shares—Statute of Frauds, 1677 (29 *Car.* 2, *c.* 3), *s.* 4.

On a claim by the appellant for specific performance of an agreement by which the first three respondents had agreed to sell to him two houses, of which they were tenants in common, the respondents pleaded, inter alia, that the agreement alleged was not a sufficient memorandum to comply with the requirements of the Statute of Frauds in that the purchaser named therein was acting, to the knowledge of the respondents, as agent for the appellant, who was the principal, and that the agreement did not identify the appellant as purchaser.

**Present :* LORD SIMONDS, LORD MACDERMOTT, LORD REID, SIR JOHN BEAUMONT and SIR LIONEL LEACH.

Held, that an agent who contracted in his own name did not cease to be contractually bound because it was proved that the other party knew when the contract was made that he was acting as agent; that the agreement which was made in his name did not cease in that event to contain the names of the contracting parties and therefore did not cease to satisfy the Statute of Frauds; and, accordingly that, as the agent could have sued on the contract, so could his principal, the appellant.

Higgins v. *Senior* (1841) 8 M. & W. 834, at p. 844, and *Calder* v. *Dobell* (1871) L. R. 6 C. P. 486, at p. 499, applied.

Decision of Younger J. in *Lovesy* v. *Palmer* [1916] 2 Ch. 233, that there was in that case no memorandum sufficient to satisfy the Statute of Frauds, and his interpretation of *Filby* v. *Hounsell* [1896] 2 Ch. 737, approved. Those two cases decided that to satisfy the statute the agreement or memorandum must name or identify two parties who were contractually bound to each other; they did not decide that where two such parties are named or identified the statute ceases to be satisfied if it is proved that one of them was known by the other when the contract was made to be acting as agent for a third party. There was nothing in those two cases to justify the distinction stated by Luxmoore L.J. in *Smith-Bird* v. *Blower* [1939] 2 All E. R. 406, at p. 407, that " if the " defendant knew that Mr. Brown was only an agent, the " memorandum, in order to comply with the statutory require- " ments, must either contain the names of the plaintiffs as " principals or otherwise identify them, whereas, if the defendant " was not aware of the fact that Mr. Brown was acting as agent " for anyone, but considered that Mr. Brown was contracting " on his own behalf, the position is different, and the plaintiffs " as undisclosed principals can rely on any sufficient memorandum " in which Mr. Brown's name appears as principal, although " there is no reference therein to the plaintiffs."

The appellant, who could not enforce the contract against the first respondent because she had in law no power to make the contract without the concurrence of her husband, was nevertheless entitled to specific performance of the contract in respect of the two one-third shares belonging to the second and third respondents.

The decision in *Lumley* v. *Ravenscroft* [1895] 1 Q. B. 683, where Lindley L.J. stated, at p. 684, that the case came within " the " general rule that where a person is jointly interested in an " estate with another person and purports to deal with the entirety " specific performance will not be granted against him as to his " share," could not be regarded as having impaired the authority of *Horrocks* v. *Rigby* (1878) 9 Ch. D. 180, where it was said by Fry J. that " where an agreement is entered into by A. and B. " with C. and it afterwards appears that B. has no interest in the " property, A. may nevertheless be compelled to convey his "interest to C.," or the authority of the opinion of Lord Hardwicke L.C. in *Attorney-General* v. *Day* (1749) 1 Ves. Sen. 218, at p. 224, which Fry J. in *Horrocks* v. *Rigby* (supra) said fortified his conclusion.

Judgment of the West African Court of Appeal reversed.

APPEAL (No. 45 of 1948) from a judgment of the West African Court of Appeal (April 8, 1948), which set aside a judgment of Wright J. in the Supreme Court of Sierra Leone (May 24, 1947).

The following introductory statement is taken from the judgment of the Judicial Committee : The appellant, Abdul Karim Basma, who was plaintiff in the action, alleged that by an agreement dated November 29, 1946, the first, second and third defendants and respondents agreed to sell to him two houses in Freetown for 1,900*l.*, and that thereupon the sum of 633*l.* 6*s.* 8*d.* was paid to each of those defendants in full satisfaction of the purchase price. The plaintiff further alleged that by deed of conveyance dated December 2, 1946, those defendants purported to convey the two houses to the fourth defendant and respondent. The plaintiff's claim was to have specific performance of his agreement with the first three defendants. The defence was a denial of that agreement. At the opening of the trial the defendants were allowed, without objection, to amend their defence by adding the words : "if at all there was such an agreement, which is not admitted, "the alleged agreement does not comply with the require-"ments of the Statute of Frauds." Evidence was then led and the plaintiff's case closed. At that stage the defendants' counsel, after having made an unsuccessful submission that there was no evidence of the alleged agreement, sought to amend the defence further by adding "The defendant Gladys "Muriel Weekes and the defendant Ettie Spaine are married "women." Objection was taken, but the amendment was allowed and the defendants' evidence was then led.

The plaintiff's case was based on a document in the following terms :

"Nos. 2 and 2A, Kissy Street, Freetown.

"We, the undersigned, the owners of the above premises "hereby agree that we have to-day sold the above premises "Nos. 2 and 2A, Kissy Street, Freetown, to Mr. C. B. Rogers "Wright, of 27, Liverpool Street, Freetown, at the price "of 1,900*l.*, which he has completely paid in three separate "sums of 633*l.* 6*s.* 8*d.* to each of us. We also hereby "agree that we will execute the deed of conveyance to "the said premises whenever it is prepared and that in the "meantime Mr. Wright shall be in possession of the said "premises as from the date hereof.

"Dated this November 29, 1946.

"(Sgd.) GLADYS WEEKES.
"(Sgd.) HENRIETTA SPAINE.
"(Sgd.) JOHN KABIA WILLIAMS."

That document will be referred to as the agreement of November 29.

The defendants did not deny that they had signed that document. They relied on three different defences: first, that the property had already been sold by the first three defendants to the fourth defendant before November 29; secondly, that the agreement of November 29 was not a sufficient memorandum to enable the plaintiff to sue on the contract; and thirdly, that the defendant Mrs. Weekes had no power to enter into the contract and that, as the contract could therefore not be performed in its entirety, there could be no order for specific performance against the other defendants.

The first of those defences was not now maintained. On that matter Wright J. did not accept the defendants' evidence: he held that the agreement of November 29 had been made and signed before the first three defendants agreed to sell the property to the fourth defendant, and that when that agreement was made the fourth defendant had notice of the earlier agreement to sell to the plaintiff. Those findings had not been challenged.

With regard to the second defence, it appeared from the judgment of Wright J. that it was argued for the defendants that the only agreement proved was an agreement between Wright and the first three defendants. Wright J. rejected that argument, holding that oral evidence had sufficiently proved that Wright was acting as agent for the plaintiff, and that there was therefore sufficient proof of a contract with the plaintiff.

The third defence was founded on the fact that before 1932 the law of Sierra Leone with regard to the capacity of a married woman was the same as the law was in England before the passing of the Married Women's Property Act, 1882, and that the Imperial Statutes (Law of Property) Adoption Ordinance of 1932 preserved any right which a husband had acquired before that date. Wright J. found himself unable to deal with that defence because the evidence was insufficient, and he therefore allowed further evidence to be called. In fact no further evidence was called. It was not clear what further submissions were made by the parties at that stage, but in his reasons for his final judgment Wright J. said, "counsel "for the plaintiff having agreed to accept judgment for specific "performance, the court therefore declares that the plaintiff "is entitled to specific performance of the agreement dated "November 29, 1946, mentioned in the pleadings to the extent "of the interests of Mrs. Spaine and John Williams with an "abatement of one-third of the purchase price in respect of "the interest of Mrs. Weekes."

The argument before their Lordships of the Board proceeded on the footing that the respondents Mrs. Weekes, Mrs. Spaine and John Williams were tenants in common of the property in question, that Mrs. Weekes, who was married in 1931, had no power to enter into the agreement of November 29, but that Mrs. Spaine, who was not married until 1944, was under no such disability. It was admitted that the sums paid to those three respondents by the appellant had been repaid to him and that, if the appellant was to have specific performance of the agreement to the extent of the interests of Mrs. Spaine and John Williams he must pay the sum of 1,266*l*. 13*s*. 4*d*. It was not disputed that that sum should in that event be paid to the fourth respondent, who had taken a conveyance of the property from the first three respondents with the concurrence of Mrs. Weekes' husband, and had paid to them the price of the property.

The second, third and fourth respondents appealed to the West African Court of Appeal. That court allowed the appeal on the ground that the agreement of November 29 was not a sufficient memorandum within the Statute of Frauds. Against that decision the present appeal was taken.

1950. March 23, 27. *R. O. Wilberforce* for the appellant. The contract for the sale of the property which was proved in evidence and established to the satisfaction of the trial judge was a contract in writing or, alternatively, a contract all the terms of which were recorded in writing, between C. B. Rogers Wright as purchaser, and the three owners of the property as vendors, signed by the latter, in which the property, the parties and the purchase price were set out, and which therefore satisfied the requirements of s. 4 of the Statute of Frauds. Parol evidence may be used for one purpose only, namely, to add a party to the contract because he is an undisclosed principal, so as to enable that other party either to sue or to be sued upon it. Parol evidence may be used for that purpose because it does not contradict the contract, it simply adds something to it. What may not be done, and what has been done in this case, is to use parol evidence to show that someone who on the face of the contract is a contracting party is not a contracting party at all, because that is using parol evidence to contradict the contract. For the general principle see Story on Agency, (8th ed.), ss. 269, 270 and 160A.

Higgins v. *Senior* (1) is similar to the present case, the only difference being that in that case it was the defendant who was trying to relieve himself from liability, whereas here the undisclosed principal was seeking to sue on the contract. *Jones* v. *Littledale* (2) is on the same principle, and applying it to this case, by putting his name in the agreement in his personal capacity Rogers Wright bound himself as a contracting party—he is the contracting party whether or not it is known that he is acting for somebody else. Reliance is also placed on *Bateman* v. *Phillips* (3), which was approved in *Higgins* v. *Senior* (1). *Lovesy* v. *Palmer* (4) establishes the principle that the test is whether the agent has contracted in such a way as to make himself personally liable, and in that case it was held that he had not, and the action failed. *Morris* v. *Wilson* (5) is a perfect illustration: it shows that in such a case it may be shown by evidence that the undisclosed principal is in fact the principal; and the fact that he is not mentioned in the document does not matter. The last case on this point is *Smith-Bird* v. *Blower* (6).

To summarize on this part of the case: the Statute of Frauds requires a memorandum of the agreement; the authorities show that an agreement is not one within the statute unless there is someone who can sue and be sued on it—that is an essential ingredient, and for that reason the memorandum must identify those persons. Parol evidence is not admissible to show that someone who appears in the memorandum as a party was not a party. That is followed out in two ways: first, if it is clear from the memorandum

(1) (1841) 8 M. & W. 834, 843–4.
(2) (1837) 6 Ad. & El. 486.
(3) (1812) 15 East 270, 274.
(4) [1916] 2 Ch. 233.
(5) (1859) 5 Jur. (N. S.) 168.
(6) [1939] 2 All E. R. 406.

that some other person is the proper party to sue and be sued then parol evidence cannot be called to identify that person; then, taking it the other way, if, according to the memorandum, the named parties are parties to the agreement, parol evidence cannot be called to prove that one of those is not in fact a party to the agreement. And it makes no difference whether the object of calling that evidence is, on the one hand, to discharge the agent from his obligations, or, on the other hand, as it is here, to say that the named party is not the party who or whose principal can take advantage of the contract. In the particular case of an agent, the test is whether the agent was intended to be personally a party to the contract. Finally, an undisclosed principal can sue and be sued, because that is not adding a party. It is plain that the defendants here intended to contract with Wright and nobody else. The Court of Appeal have gone too far in saying that this is clearly a case of a disclosed principal; the defendants have sworn the contrary.

Passing to the second point, namely, whether specific performance was rightly granted in relation to the shares other than that of Mrs. Weekes, who could not convey her share without the concurrence of her husband, once it appeared that Mrs. Weekes could not give a good title to her share obviously the vendors could not have forced the remaining two shares on the plaintiff, but if he chooses to accept specific performance in relation to the other two shares in respect of which there is no difficulty he is entitled to do so. An agreement by each of the individuals is a separate bargain in relation to each separate share. [Reference was made to Sugden, Vendors and Purchasers, 14th ed., p. 316, and to Fry on Specific Performance, 6th ed., ss. 1257, 1262–1265.]

Admittedly the position between joint tenants is different from that between tenants in common. Reliance is placed on the statement of Fry J. in *Horrocks* v. *Rigby* (1) where he said, " I think that where an agreement is entered into by " A. and B. with C., and it afterwards appears that B. has no " interest in the property. A. may nevertheless be compelled " to convey his interest to C." [Reference was also made to *Hexter* v. *Pearce* (2) and *Lumley* v. *Ravenscroft* (3).] It does not appear that any one of the present three tenants in common would be prejudiced by any of the others failing to carry out

(1) (1878) 9 Ch. D. 180, 182.

(2) [1900] 1 Ch. 341, 345.

(3) [1895] 1 Q. B. 683.

his contract—he would still get his 633*l*. odd; it is quite different from the case of a lease of property, particularly a mineral lease. A correct statement of the principle in relation to this matter of tenants in common appears in *Attorney-General* v. *Day* (1).

Patrick O'Connor for the respondents. The first question is whether the plaintiff has proved a sufficient writing to bring himself within the statute. The statute makes a clear difference between a written agreement and a memorandum. There is authority to support that difference. The written contract is one where the actual contract itself is in writing, that means that the instrument which is relied on is both contract and evidence of contract together. It must be seen what the plaintiff says about the agreement: he pleads it in his statement of claim and he gave evidence. He is saying that he negotiated with the respondent Williams and that it was agreed that Wright should act as his agent, possibly as a mutual agent, in the transaction. That is the plaintiff's case on this matter, and at that stage it is clear that he has not brought himself within the statute, which requires that he should produce some writing which for the purposes of the present action properly identifies the parties to the contract. He cannot put his hand on any writing which satisfactorily identifies him, and, the matter standing there, he is forced on to quite a different branch of the law to see whether he can take advantage of something which is in the name of the agent. The document which he sought to rely on—the agreement—is bad so far as he is concerned because it does not name him or refer to him in any other way to enable the court to identify him. The plaintiff then sought to connect himself orally with the name in the memorandum, and it is submitted that he cannot do that. He says: Wright was my agent, and as his principal I am entitled to enforce the contract. It was recognized that that step is too wide, and it was sought in the West African Court of Appeal and before this Board to limit that proposition by saying that it has to be qualified to the effect that "Wright is my agent, and since he made himself "personally liable I, as his principal, am entitled to enforce "the contract." So all that is left is Wright merely as a name appearing in a document.

We may start with the position of an undisclosed principal in English law: *Dyster* v. *Randall & Sons* (2). Here the

(1) (1749) 1 Ves. Sen. 218, 224. (2) [1926] Ch. 932, 938.

plaintiff comes forward and says, " I am principal, and there-" fore I can be identified by a document which does not refer " to me." It is an anomalous position and it goes beyond the position of a true undisclosed principal. He cannot bring himself within the statute. If it were always open to a principal in any circumstances to identify himself with his agent a large number of authorities would be unnecessary; they are not, and they show that the matter is to be confined to the true undisclosed principal. It is submitted that *Morris* v. *Wilson* (1) was wrongly decided. In so far as *Bateman* v. *Phillips* (2) is an authority that a disclosed principal can seek the benefit of a memorandum in which he is not identified, it should not be followed. *Higgins* v. *Senior* (3) was solely a case of estoppel, and is no authority for saying that a disclosed principal can identify himself with the name of some person other than himself in the memorandum of the contract. [Reference was also made to *Jones* v. *Littledale* (4), *Jarrett* v. *Hunter* (5), *Lovesy* v. *Palmer* (6), and *Smith-Bird* v. *Blower* (7).] The question is whether any but a true undisclosed principal can seek to rely on a memorandum which does not name him. He cannot. In the present case Wright was not liable on the contract, and as such was not a party.

On the question of the divisibility of this contract, it is relevant to see who the parties to the agreement were. They were a brother and two sisters who were tenants in common of the property. If the agreement which they signed is to be the contract for this sale, it is the whole property that is being sold, and the fact that the purchase price is to be received in equal shares does not turn the contract into three contracts; that part of the agreement is only a receipt. When, therefore, the contract broke down as a result of Mrs. Weekes' inability to perform it, the plaintiff was not entitled to seek specific performance against the two remaining parties. That would be contrary to the principle laid down by Lindley L.J. in *Lumley* v. *Ravenscroft* (8). There is no contract left at all, and the contracting party's remedy is in damages. The real question is whether this is one or three contracts. If it is one it cannot be split.

(1) 5 Jur. (N. S.) 168.
(2) 15 East 274.
(3) 8 M. & W. 834, 846, 889–90.
(4) 6 Ad. & El. 486.
(5) (1886) 34 Ch. D. 182, 184.
(6) [1916] 2 Ch. 233, 243.
(7) [1939] 2 All E. R. 406.
(8) [1895] 1 Q. B. 683, 684.

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R. O. Wilberforce in reply. The essence of this case comes back to what is the meaning of an undisclosed principal: does it mean a principal the existence of whom is not known, or a principal the existence of whom is not disclosed in the memorandum? Undisclosed means not disclosed in the memorandum. The agreement is signed by Wright, and he is contractually liable under it.

May 3. Lord Reid, delivering the judgment of the Board, stated the facts set out above and continued: The agreement of November 29 apparently satisfies the requirements of the Statute of Frauds. It names the vendors and the purchaser; it specifies the subjects sold and the price; and it is signed by the vendors, the parties to be charged. Further, it states that Wright, who is named as the purchaser, has paid the price and is entitled to immediate possession. Wright is a solicitor, and admittedly it was proved by oral evidence that he was acting in this matter as agent for the appellant. But there is nothing in the document to suggest that Wright was acting otherwise than as principal.

The first question in this case is whether it is relevant to inquire whether the vendors when they made the agreement knew that Wright was acting as agent for the appellant, and whether, if such knowledge is proved, the fact that the agreement does not identify the appellant as purchaser makes it insufficient to satisfy the Statute of Frauds. Wright J. did not deal with this question—probably the point was not taken before him—but the West African Court of Appeal held that the vendors were aware that Wright was purchasing as agent for the appellant. There is evidence to support this finding and their Lordships will assume that it is correct. After so holding the judgment of the Court of Appeal proceeds, "It follows therefore that the memorandum to enable the "respondent [now the appellant] to sue on it must have "contained his name either as a principal or in some other "way to identify him. As it clearly fails to do so, we hold "that the document was not a sufficient memorandum within "the Statute of Frauds."

The authority on which the Court of Appeal rely is the judgment of Luxmoore L.J. in *Smith-Bird* v. *Blower* (1), and there is in that judgment a passage which is directly

(1) [1939] 2 All E. R. 406.

applicable to the present case. But before proceeding to examine that judgment their Lordships must refer to certain earlier cases the authority of which has never been doubted but which do not appear to have been cited to Luxmoore L.J. In *Higgins* v. *Senior* (1), there was an agreement in writing for the sale of goods above the value of 10*l.*, which purported on the face of it to be made by the defendant and was subscribed by him ; but the defendant sought to avoid liability by proving that he made the agreement as agent for a third person and that this was known at the time to the plaintiff. It was held that this did not enable the defendant to escape liability. Parke B., in delivering the judgment of the court, stated the principle as follows (2): " There is no doubt, that where such an " agreement is made, it is competent to show that one or both " of the contracting parties were agents for other persons, " and acted as such agents in making the contract, so as to " give the benefit of the contract on the one hand to, and " charge with liability on the other, the unnamed principals : " and this, whether the agreement be or be not required to be " in writing by the Statute of Frauds : and this evidence in " no way contradicts the written agreement. It does not " deny that it is binding on those whom, on the face of it, " it purports to bind ; but shows that it also binds another, " by reason that the act of the agent, in signing the agreement, " in pursuance of his authority, is in law the act of the principal. " But, on the other hand, to allow evidence to be given " that the party who appears on the face of the instrument to " be personally a contracting party, is not such, would be to " allow parol evidence to contradict the written agreement ; " which cannot be done. And this view of the law accords " with the decisions, not merely as to bills of exchange signed " by a person, without stating his agency on the face of the " bill, but as to other written contracts, namely, the cases of " *Jones* v. *Littledale* (3) and *Magee* v. *Atkinson* (4). It is " true that the case of *Jones* v. *Littledale* (3) might be supported " on the ground that the agent really intended to contract as " principal : but Lord Denman, in delivering the judgment " of the court, lays down this as a general proposition, " ' that if the agent contracts in such a form as to make himself " ' personally responsible, he cannot afterwards, whether his

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(1) 8 M. & W. 834.
(2) Ibid. 844.
(3) 6 Ad & El. 486.
(4) (1837) 2 M. & W. 440.

" ' principal were or were not known at the time of the con-" ' tract, relieve himself from that responsibility.' And this " is also laid down in Story on Agency, s. 269."

In *Calder* v. *Dobell* (1), Cherry, a broker, contracted in his own name to buy goods from the plaintiffs, having previously disclosed to them that he was acting as agent for the defendant. It was held unanimously by the Court of Common Pleas and in the Exchequer Chamber that the plaintiffs were entitled to sue the defendant on this contract. It was argued for the defendant that there is a distinction between the case where one party is not aware when making the contract that the other is acting as an agent and the case where he is aware of that fact but nevertheless the contract is made by the agent in his own name, and that the principal could be sued in the former case but not in the latter. This argument was rejected. It was held that in this respect there is no distinction between the two cases, and the authority of *Higgins* v. *Senior* (2) was fully recognized. Kelly C.B. said: " The contract was " made in the name of Cherry, the agent; but the case shows " that it was made on behalf of a principal who was named " at the time. I think the plaintiffs had a right to sue either " the agent or the principal, at their election " (3).

The circumstances in *Smith-Bird's* case (4) were that the defendant wished to sell two houses, that one Brown, who had been authorized by the plaintiffs to buy the houses, was introduced to the defendant and after some negotiation agreed to buy the houses for 510*l.*, and that the document relied on as a memorandum of this agreement contained nothing to indicate that the plaintiffs were the purchasers or that Brown was acting otherwise than on his own behalf. Luxmoore L.J., having held that there was an oral contract to sell the houses, said " the further question arises whether " there is a sufficient memorandum of that contract to comply " with the requirements of the statute. In this connexion, " it is necessary to determine whether the defendant was " aware that Mr. Brown was acting as agent only, and not as " principal, for, if the defendant knew that Mr. Brown was " only an agent, the memorandum, in order to comply " with the statutory requirements, must either contain the " names of the plaintiffs as principals or otherwise identify " them, whereas, if the defendant was not aware of the fact

(1) (1871) L. R. 6 C. P. 486.
(2) 8 M. & W. 834.
(3) L. R. 6 C. P. 499.
(4) [1939] 2 All E. R. 406.

"that Mr. Brown was acting as agent for anyone, but con-"sidered that Mr. Brown was contracting on his own behalf, "the position is different, and the plaintiffs as undisclosed "principals can rely on any sufficient memorandum in which "Mr. Brown's name appears as principal, although there is "no reference therein to the plaintiffs" (1). The Lord Justice cited as authority for this proposition the cases of *Lovesy* v. *Palmer* (2) and *Filby* v. *Hounsell* (3). In *Lovesy* v. *Palmer* (2) the plaintiff claimed a declaration that there was a binding contract between the defendants and himself with regard to the lease of a theatre. One question was whether there was any memorandum of the alleged agreement sufficient to satisfy the Statute of Frauds. The facts were complicated and a number of documents were alleged to form together such a memorandum. In these documents the plaintiff's solicitor was named, but he only purported to contract on behalf of unnamed "clients." Younger J. held that at no time could this solicitor have sued or been sued on the contract; and there was no reference in the documents to the plaintiff as a contracting party. So it was impossible to identify from the documents any person who could sue the defendants or be sued by them on the alleged contract, and Younger J. held, rightly in their Lordships' judgment, that there was no memorandum sufficient to satisfy the Statute of Frauds. It had been argued for the plaintiff that *Filby* v. *Hounsell* (3) had decided that it was enough that the solicitor purported to act on behalf of "clients" and that the "clients" were identified by parol evidence. With regard to that case Younger J. said, "If it was in fact decided in *Filby* v. *Hounsell* "(3) that there could within the statute be a sufficient memo-"randum of an agreement where the principal was not "named and the agent was not bound, then I do not think "that the decision can stand with the other authorities, such "as *Rossiter* v. *Miller* (4), and *Jarrett* v. *Hunter* (5), or with "the Statute as I read it. But I think, when one looks care-"fully at the case of *Filby* v. *Hounsell* (3), that Romer J. "really gave the judgment he did because he assumed that the "agent was liable on the contract. I cannot myself see for "reasons I have given that the assumption was well founded, "but if that was the basis of the learned judge's decision, then

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(1) [1939] 2 All E. R. 406, 407–8.
(2) [1916] 2 Ch. 233.
(3) [1896] 2 Ch. 737.
(4) (1878) 3 App. Cas. 1124.
(5) 34 Ch. D. 182.

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"the case presents no further difficulty and is in entire harmony "with all the authorities" (1).

Their Lordships agree with this interpretation of *Filby* v. *Hounsell* (2), and they are unable to find either in that case so interpreted or in *Lovesy* v. *Palmer* (1) anything to justify the distinction stated in the passage quoted from the judgment in *Smith-Bird* v. *Blower* (3). Those cases decide that to satisfy the statute the agreement or memorandum must name or identify two parties who are contractually bound to each other. They do not decide that where two such parties are named or identified the statute ceases to be satisfied if it is proved that one of them was known by the other, when the contract was made, to be acting as agent for a third party. No doubt that result would follow if it were the law that an agent who contracts in his own name is not contractually bound if the other party knew at the time that he was acting as agent. If that were so, the agreement or memorandum would on proof of such knowledge cease to contain the names of two contracting parties, and would therefore cease to satisfy the statute. But it is clear from *Higgins* v. *Senior* (4) and *Calder* v. *Dobell* (5) that that is not the law: an agent who contracts in his own name does not cease to be contractually bound because it is proved that the other party knew when the contract was made that he was acting as agent. So the agreement which is made in his name does not cease in that event to contain the names of contracting parties, and therefore does not cease to satisfy the statute. Their Lordships are satisfied that in the present case the terms of the agreement of November 29 are such that Wright was contractually bound, and therefore the agreement satisfies the Statute of Frauds. So Wright could have sued on the agreement, and if he could sue, so can his principal, the appellant.

The other question in this appeal is whether the appellant is entitled to have specific performance of a part of his contract. He agreed to buy two houses which were owned by the first, second and third respondents as tenants in common. He cannot enforce this contract against the first respondent because she had no power to make the contract. Can he enforce it against the second and third respondents so as to require conveyance to him of the two one-third shares which

(1) [1916] 2 Ch. 233, 244.
(2) [1896] 2 Ch. 737.
(3) [1939] 2 All E. R. 406.
(4) 8 M. & W. 834.
(5) L. R. 6 C. P. 486.

belonged to these respondents ? Cases have not infrequently arisen where a single vendor has been unable to give a good title to all that he has contracted to sell. The general rule in such a case has been stated by Lord St. Leonards thus (Sugden, Vendors and Purchasers (14th ed.), pp. 316–317) : " A purchaser generally although not universally may take " what he can get with compensation for what he cannot " have . . . . In regard to the limits of the rule that a purchaser may elect to take the part to which a title can be " made at a proportionate price, it has not been determined " whether under any circumstances of deterioration to the " remaining property the vendor could be exempted from the " obligation of conveying that part to which a title could be " made : but the proposition is untenable that if there is " a considerable part to which no title could be made the vendor " was therefore exempted from the necessity of conveying " any part."

In the present case there are three vendors. One cannot convey her interest, but there is nothing to prevent the conveyance of the interests which belonged to the others. This type of case is less common, but one example is *Horrocks* v. *Rigby* (1), where two persons agreed to sell a public house and it was found on investigation that one of them had no interest in it but that a moiety belonged to the other. In an action by the purchaser against the latter vendor for specific performance Fry J. said (2) : " I think that where an " agreement is entered into by A. and B. with C. and it afterwards appears that B. has no interest in the property, " A. may nevertheless be compelled to convey his interest to " C. I should have come to that conclusion upon principle, " for I do not see why a purchaser is to lose his right against " a vendor who can complete, because from a circumstance " of which the purchaser had no knowledge, he has no right " against persons who cannot complete. But I am very much " fortified in that conclusion by a passage in the judgment " of Lord Hardwicke in *Attorney-General* v. *Day* (3)."

This passage which is quoted by Fry J. is (4) : " On the " other hand, if on the death of one of the tenants in common " who contracted for a sale of the estate, the purchaser brings " a bill against the survivor, desiring to take a moiety of the " estate only, the interest in the money being divided by the

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(1) 9 Ch. D. 180.
(2) Ibid. 182.
(3) 1 Ves. Sen. 218.
(4) Ibid. 224.

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"interest in the estate, I should think (though I give no "absolute opinion as to that) in the case of a common person "he might have a conveyance of a moiety from the survivor "although the contract cannot be executed against the heir "of the other."

Their Lordships would have no hesitation in following these authorities but for the judgment of Lindley L.J. in *Lumley* v. *Ravenscroft* (1). In that case the two defendants, who appear to have been tenants in common, had agreed through their agent to grant a lease of certain premises to the plaintiff. The plaintiff brought an action for specific performance or, alternatively, for damages, and applied for an injunction to restrain the defendants until after the trial of the action from leasing the premises to any other person. It appeared that one of the defendants was an infant. Day J. granted an injunction, but an appeal from this order was allowed. Lindley L.J. in the leading judgment of the Court of Appeal said (2): "Specific performance is out of the question. You "cannot get specific performance against an infant; and upon "the evidence before us no case is made out for specific performance against the other defendant either. This case "is not within the exception as to misrepresentation or misconduct stated in *Price* v. *Griffith* (3) and *Thomas* v. *Dering* "(4), but comes within the general rule that where a person "is jointly interested in an estate with another person and "purports to deal with the entirety specific performance will "not be granted against him as to his share. The plaintiff's "only remedy is by way of damages."

Neither *Horrocks* v. *Rigby* (5) nor *Attorney-General* v. *Day* (6) was cited to the court: indeed, *Price* v. *Griffith* (3) and *Thomas* v. *Dering* (4) appear to have been the only authorities cited in argument, the argument for the plaintiff as reported being very meagre. Both *Price* v. *Griffith* (3) and *Thomas* v. *Dering* (4) were cases of an unusual character. *Price* v. *Griffith* (3) was discussed and explained by Farwell J. in *Hexter* v. *Pearce* (7). In *Price* v. *Griffith* (3) two tenants in common were alleged to have agreed to grant a mineral lease. The plaintiff failed to prove any agreement at all with one of them, and, as Farwell J. points out, the case was really decided on the

(1) [1895] 1 Q. B. 683.
(2) Ibid. 684.
(3) (1851) 1 D. M. & G. 80.
(4) (1837) 1 Keen 729.
(5) 9 Ch. D. 180.
(6) 1 Ves. Sen. 218.
(7) [1900] 1 Ch. 341.

ground that the agreement with the other was void for uncertainty. But Knight Bruce L.J. said with regard to the claim of the plaintiff to have specific performance against only one of the two tenants in common (1): "If he [the tenant in "common] intended to contract at all, he intended to contract "for a lease of the whole colliery. Cases may be conceived "where a person, who has contracted to convey more than "it is in his power to convey, ought to be decreed to convey "what he can, either with or without compensation to the "vendee for such part of the subject-matter of the contract "as the vendor is unable to convey. But a lease of an "undivided moiety of a colliery is a very different thing from "a lease of a whole colliery."

That passage might be read as affording support for the general rule stated by Lindley L.J., but Farwell J. read it in a narrower sense. He said with regard to it (2): "In "a sense, with great deference to the Lord Justice, that is "a truism; but the meaning, I think, is that in that case "the intention of the lessor was to grant a lease of the entirety "and nothing else. There would have been a certain hardship "in compelling him to grant a lease of a moiety only when "he did not intend it, having regard to the fact that it was "a lease of mineral property. I think that is all the Lord "Justice meant."

So interpreted, *Price* v. *Griffiths* (3) is not an authority for any general rule. In *Thomas* v. *Dering* (4) there was only one vendor, and their Lordships do not think it helpful to examine the case closely, as they have found nothing in it to throw light on the position where there are more than one vendor and one of the vendors cannot complete the contract. Their Lordships have reached the conclusion that the weight which must otherwise be given to a judgment of Lord Lindley is in this case seriously diminished by the circumstances to which they have adverted, and that the decision in *Lumley* v. *Ravenscroft* (5) cannot be regarded as having impaired the authority of *Horrocks* v. *Rigby* (6) or of the opinion of Lord Hardwicke in *Attorney-General* v. *Day* (7). In the present case there appear to be no special circumstances which would make it wrong to grant specific performance, and their

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(1) 1 D. M. & G. 84.

(2) [1900] 1 Ch. 345.

(3) (1851) 1 D. M. & G. 80.

(4) 1 Keen 729.

(5) [1895] 1 Q. B. 683.

(6) 9 Ch. D. 180.

(7) 1 Ves. Sen. 218.

Lordships hold that the decision of Wright J. was correct in principle. It was not argued that the form of the order made by Wright J. should be altered in any way.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of Wright J. restored. The respondents, other than the respondent Mrs. Weekes, will pay the costs of this appeal and in the West African Court of Appeal.

Solicitors: *Lawrence-Jones & Co.; Cree, Godfrey & Wood.*

J. C.*
1950
Mar. 30;
May 10.

SAMBASIVAM . . . . . . APPELLANT;

AND

PUBLIC PROSECUTOR, FEDERATION OF MALAYA . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA.

Criminal law (Malaya)—Emergency regulations—Charges of carrying firearm and of possessing ammunition—Acquittal on second charge—Retrial on first charge—Validity of certificate of Deputy Public Prosecutor—"Carries" a firearm—Knowledge—Intent to use—Copy of statement made to police by prospective witness to be supplied to accused person—Non-compliance—Effect—Statement made "to" police inspector through interpreter—Admission of alleged statement of accused person admitting guilt of both offences originally charged—Omission to inform assessors of previous acquittal on second charge—Effect on validity of second trial—Emergency Regulations, 1948, *reg.* 4, *sub-reg.* 1 (*a*) (*b*); *reg.* 33, *sub-reg.* 1 *—Emergency (Criminal Trials) Regulations,* 1948, *regs.* 7, 11.

Regulation 7 of the Emergency (Criminal Trials) Regulations, 1948, of the Federated Malay States applies to a "case" in which several charges may properly be joined for trial together.

A deputy public prosecutor had issued a certificate under reg. 7 for the trial of the appellant on two charges framed under reg. 4, sub-reg. 1 (*a*) and (*b*) of the Emergency Regulations, 1948, of carrying a firearm and of being in possession of ammunition,

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**Present:* LORD SIMONDS, LORD MACDERMOTT, LORD REID, SIR JOHN BEAUMONT and SIR LIONEL LEACH.

respectively. The appellant was acquitted on the second charge, but a re-trial was ordered on the first charge.

Held, that there was no necessity for a further certificate to be given after the acquittal and directed solely to the charge of carrying a firearm, for the first trial did not dispose of more than a part of the case as certified.

" Carries " in reg. 4, sub-reg. 1, of the Emergency Regulations, 1948, which provides that " any person who carries . . . . any " firearm . . . . shall be guilty of an offence . . . . " means " carries to his knowledge." The regulation, however, says nothing of any special intent, and there is no ground on which an intent to use the firearm as an offensive weapon, or to have it so used, should as a matter of implication be regarded as an element of the offence. The regulation was intended to strike at the carrying of firearms simpliciter if engaged in knowingly and without lawful authority.

A witness at the second trial departed from the evidence which he gave at the first trial as to what he saw the appellant do in connexion with the offence charged.

Held, that the appellant's counsel at the second trial was entitled to cross-examine the witness as to what he had said at the first trial so as to demonstrate to the court the fact and extent of the discrepancy.

Compliance with reg. 11 of the Emergency (Criminal Trials) Regulations, which provides that " the prosecution shall, not less " than two clear days before the date fixed for the trial of the " case, furnish to the accused person . . . . a copy of the " statements made to the police during the police investigation " of all persons whom it is intended to call as witnesses for the " prosecution . . . . " is not a condition precedent to the reception of the evidence concerned. The regulation is directory in character and not such as to preclude the trial judge, in the exercise of his discretion, from admitting testimony in respect of which the requisite notice has not been given. While failure to observe the regulation is to be regarded as an irregularity rather than as a fundamental defect, evidence tendered in breach of its requirements ought not to be admitted readily or so as to deny to the accused person any real benefit which compliance would have conferred.

For the purposes of reg. 33, sub-reg. 1 of the Emergency Regulations, a statement is made " to " a police inspector although he requires the services of an interpreter to understand what is said.

A statement which was relied on by the prosecution was alleged to have been made by the appellant, which statement, if accepted as the truth, went to prove him guilty of the charge of being in possession of ammunition, of which he had been acquitted at the first trial, as clearly as it proved him guilty of the offence the subject of the second trial.

Held, that the effect of the omission to inform the assessors at the second trial that the appellant had been found not guilty

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of being in possession of ammunition and was to be taken as entirely innocent of that charge was to render the second trial unsatisfactory in a material respect. While what the assessors would have done had the statement been excluded from evidence or its effect qualified by an unequivocal direction as to the appellant's acquittal and the effect thereof must remain a matter of conjecture, the uncertainties were sufficiently reasonable to jeopardize the verdict and to justify the setting aside of the conviction of, and the sentence passed on, the appellant.

Order of the Supreme Court of the Federation of Malaya reversed.

APPEAL (No. 32 of 1949), by special leave, against an order of the Supreme Court of the Federation of Malaya (Court of Appeal) (Willan C.J., Hill and Wilkinson JJ.) (April 28, 1949) dismissing an appeal from a judgment of the Supreme Court of Johore (Storr J.) (March 22, 1949) whereby the appellant was convicted of carrying a firearm under reg. 4, sub-reg. 1 (*a*), of the Emergency Regulations, 1948, and sentenced to death.

The following facts are taken from the judgment of the Judicial Committee:—On the morning of September 13, 1948, the appellant, an Indian Tamil clerk, was travelling on foot in the State of Johore in the company of two Chinese. They met a party of three Malays and a fight ensued, in the course of which one of the Chinese was killed, and the appellant was seriously wounded. The other Chinese escaped and had not, apparently, been heard of since. The Malays, who were armed with knives, alleged that they had been fired on by the Chinese and that the appellant had drawn and pointed a revolver at one of them before he had been wounded and disarmed. In connexion with that incident the appellant was later charged with carrying a firearm and being in possession of ten rounds of ammunition. Those charges were preferred under reg. 4, sub-reg. 1, of the Emergency Regulations, 1948, which read as follows:—

"4.—(1.) Any person who carries or who has in his "possession or under his control—

"(*a*) any fire-arm, not being a fire-arm which he is "duly licensed to carry or possess under any other written "law for the time being in force; or

"(*b*) any ammunition or explosives without lawful "authority therefor,

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"shall be guilty of an offence against these Regulations "and shall on conviction be punished with death."

By the Emergency (Criminal Trials) Regulations, 1948 (hereinafter referred to as the Trials Regulations), provision was made for a simplified procedure, without any preliminary inquiry, in the case of certain offences within the Federation. The applicability of the Trials Regulations, in so far as material, depended on a certificate being given under reg. 7 thereof, which was in these terms:—

"7. Where a person is charged with any offence against "any written law and the Public Prosecutor certifies in "writing that the case is a proper one for trial under these "regulations, such case shall be tried and disposed of in "accordance with the provisions of regs. 8 to 12 inclusive "of these Regulations."

By reg. 2 the expression "Public Prosecutor" included a Deputy Public Prosecutor. On November 25, 1948, Mr. McCall, admittedly a Deputy Public Prosecutor, purported to issue a certificate under reg. 7 relating to the offences charged against the appellant. It would be convenient to quote that document fully for its terms were important and it specified the charges on which the appellant was subsequently tried. It was signed by Mr. McCall and ran thus:—

"The Emergency (Criminal Trials) Regulations, 1948.

"I, William Martin McCall, Deputy Public Prosecutor, "in accordance with the provisions of s. 7 of the Emergency "(Criminal Trials) Regulations, 1948, hereby certify that "the trial of Sivam alias Sambasivam s/o Narayanasamy "on the following charges, namely:—

"1. That he at about 10 a.m. on September 13, 1948, "at Bukit Kepong, Muar, in the State of Johore, carried "a .38 revolver which he was not duly licensed to carry, "and he has thereby committed an offence punishable "under reg. 4 (1) (*a*) of the Emergency Regulations, "1948; and

"2. That he at about 10 a.m. on September 13, 1948, "at Bukit Kepong, Muar, in the State of Johore, had in "his possession ten rounds of .38 ammunition without "lawful authority therefor and he has thereby committed an offence punishable under reg. 4 (1) (*b*) of the "Emergency Regulations, 1948,

"is a proper case for trial under the said Regulations and

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"I hereby designate Johore Bahru as the place where such "trial shall be held.

"Dated at Johore this 25th day of November, 1948.

"(Sgd.) W. Martin McCall,
"Deputy Public Prosecutor for
"Solicitor-General."

On March 2, 1949, the appellant was tried under the emergency procedure prescribed by the Trial Regulations on both those charges in the Supreme Court at Johore Bahru before Laville J. and two assessors. On the second charge—that relating to the possession of ammunition and framed under reg. 4, sub-reg. 1 (*b*), of the Emergency Regulations—both assessors returned a verdict of not guilty and, the learned judge agreeing with that finding, the appellant was duly acquitted. On the first charge—that relating to the carrying of a firearm and framed under reg. 4, sub-reg. 1 (*a*)—the assessors also found the appellant not guilty but Laville J. disagreed with that finding and ordered a re-trial. That was done under s. 198 (ii) of the Criminal Procedure Code which provided: "If the court is unable to agree with the opinion of both "assessors, ... the proceedings shall be stayed and a new "trial held with the aid of fresh assessors."

The re-trial on the first charge took place on March 21 and 22, 1949, before Storr J., and two different assessors. They found the appellant guilty and he was sentenced to death in accordance with reg. 4, sub-reg. 1, of the Emergency Regulations. The appellant appealed against his conviction, but on April 28, 1949, the Court of Appeal dismissed his appeal without calling on counsel for the prosecution and, so far as the record showed, without pronouncing any reasoned judgment.

1950. March 28, 29, 30. *Scott Cairns K.C.* and *Handoo* for the appellant. The first point is that, whereas in respect of the first of the two trials there was a certificate under reg. 7 of the Trials Regulations, for the second trial there was no such certificate. It is necessary in any case where there is a re-trial to have a fresh certificate, because the proceedings have been brought to an end. In particular in this case a fresh certificate is necessary because it is not the same case. The case which was certified in the first instance was a case of two charges—carrying a firearm and being in

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possession of ammunition—whereas the case in the second trial is the single charge of carrying a firearm, without reference to ammunition. There was thus a different case requiring a fresh certificate. On a strict construction of the regulations, even if the charge is identical, the case is a different one. A certificate that the trial on these two charges is a proper case is not a certificate that the trial of the same person on the single charge is a proper case.

The second point is that the certificate as given in respect of the first trial was in any event invalid, and therefore none of the proceedings which followed from it were valid proceedings. It is signed by the " Deputy Public Prosecutor for " Solicitor-General." The words which make it bad are " for Solicitor-General." It has to be signed by the Public Prosecutor as defined in the Trials Regulations, and under reg. 2, " Public Prosecutor " includes a Deputy Public Prosecutor. It could therefore be signed by the Public Prosecutor on his own behalf, or by a Deputy Public Prosecutor on his own behalf, but not by the Solicitor-General.

The argument can be divided into three parts: (i.) the certificate is not a valid certificate of the Deputy Public Prosecutor because he has not purported to sign it on his own behalf; (ii.) it is not a valid certificate of the Solicitor-General—it is not a valid certificate through the Deputy Public Prosecutor because (*a*) the regulation does not authorize the giving of a certificate by an agent, and (*b*) there is no evidence of authority; (iii.) if that be wrong, and this is to be treated as a certificate of the Solicitor-General, he has no power to give the certificate: he is not a Public Prosecutor under s. 376, sub-s. 1, of the Criminal Procedure Code; he is not a Deputy Public Prosecutor under s. 376, sub-s. 3, of that Code, and, in the absence of evidence that the Attorney-General was away or unable to act, he cannot be said to be acting as Public Prosecutor. The highest that it can be put in relation to the Solicitor-General is to say that under s. 376, sub-s. 2, of the Code he had the powers of a Deputy Public Prosecutor. But it is submitted that the power cannot be delegated because there is no provision for delegation.

The third point is that the appellant's counsel at the second trial was stopped from referring to the previous trial, and thereby prevented from effectively cross-examining one of the witnesses. The main evidence at both trials consisted of the evidence of three Malays, and, as appears from the Record

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from the notes of the second trial, when counsel for the appellant tried to put to one of those Malays that he had given different evidence in the first trial from that which he was giving in the second, the judge said that he must not do that—must not refer to the fact that there had been a previous trial. That prevented the witness from being cross-examined and very seriously deprived the appellant of the right of testing the case that was put against him.

The fourth point arises in connexion with a statement alleged to have been made by the appellant to a police inspector, which was admitted in evidence at the second trial. With regard to that statement three points are taken, two of them as to its admissibility, and the third as to its weight. As to admissibility, it is submitted, first, that under reg. 11 of the Trials Regulations it was necessary before any evidence could be given by the police officers to prove the alleged statement of the appellant, that copies of the statements to be made by those police officers as witnesses should be supplied to the accused person two clear days before the hearing, and that was not done. They were not supplied at all. Secondly, the alleged statement of the appellant is inadmissible because, in order that it should be admissible, it had, under reg. 33, sub-reg. 1, of the Emergency Regulations, to be made "to or in the "hearing of" a police officer not below the rank of inspector. The police officer who gave evidence with regard to it was a police inspector who did not understand the language in which the appellant made his statement. There was present another police officer who did understand the language of the appellant, which was Tamil, and who translated it from Tamil into Malay, and the inspector then wrote it down in English. The objection under this head is that a statement cannot be said to be made "in the hearing of" a police inspector if the statement is made, though literally in his hearing, in a language which he does not understand. The words are not "in the "presence of" or "under the supervision of," but "in the "hearing of."

Thirdly, which goes only to weight, but is a matter of no little importance, the alleged statement was made within a few hours after the time when the appellant had been most gravely wounded. He had been left lying in the road by people who, at the time, thought that he was about to die. Evidence that a statement of that kind was made in those circumstances is evidence which no court should believe;

and further, any statement made by a man in that condition is one, if he did make it, on which no reliance should be placed. He said that he never made any such statement at all. In all the circumstances there is so much suspicion and doubt attaching to the statement that any conviction founded on it cannot stand; and the fact that it was given in evidence, is relied on as a main part of the prosecution case, and so treated by the judge in his summing-up, vitiates the trial and means that there has been a grave miscarriage of justice. There appears to be no direct authority on the question whether, where a statement included admissions with regard to the subject-matter of the charge that was being tried and also contained admissions with regard to some other crime, the statement could be used. The nearest case is *Rex* v. *Evans* (1).

The fifth and last point is whether, on the evidence, the appellant could be said to be carrying a firearm within the meaning of the regulation, which, it is submitted, must mean carrying a firearm with the intention of using it as such. The regulation refers to " carries or who has in his possession " or under his control." There would be no offence unless the appellant not only knew that he was carrying a firearm, but intended to use it. Some assistance in this connexion may be obtained from the Indian cases: *Emperor* v. *Harpal Rai* (2); *Madho Lal* v. *Emperor* (3); *Emperor* v. *Muhammad Hasan* (4) *Aratoon Malcolm* v. *Emperor* (5).

Casswell K.C., *J. G. Le Quesne* and *A. M. I. Austin* for the respondent. These were emergency regulations which were passed in July, 1949, to meet a very great danger in the Federated Malay States. The Ordinance in question says quite clearly " any person who carries . . . . any fire-" arm, ..." ; whether he has the intention to use it or not, if he is carrying it he is guilty of an offence under that regulation. Intent to use it is not a necessary ingredient of the offence, but, even if it were, there is abundant evidence of that intention in this case. With regard to the certificate, there was no need for a second one. That which was given was to the effect that it was a proper case to be tried and disposed of. And when once he has been committed, the fact that the appellant has been acquitted on one charge in the case has not disposed of the case: he is still in peril. He needs no further committal for trial; he has been neither acquitted nor convicted; the case has not been disposed of; and therefore no fresh certificate will be needed. That which was given for both counts was good for either.

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(1) [1950] W. N. 111.
(2) (1902) I. L. R. 24 A. 454.
(3) (1908) 13 Cal. W. N. 124.
(4) (1924) I. L. R. 47 A. 267.
(5) (1933) I. L. R. 60 C. 445, 450.

It was next said to have been given by the wrong person. The effect of the words "for Solicitor-General" is either that the Solicitor-General was signing and that the Deputy Public Prosecutor was signing on his behalf—and the Solicitor-General was perfectly entitled to do so: s. 376, sub-s. 2, of the Criminal Procedure Code; or that he has delegated to the Deputy Public Prosecutor, who is signing because he had authority from the Solicitor-General to make up his mind whether the case was one in which a certificate should be given. Those words cannot invalidate the certificate, and the court is not deprived of jurisdiction under the Trials Regulations because of the form of the certificate.

The question of counsel having been stopped was not taken at the trial or on the petition for special leave; it appears for the first time in the appellant's printed case, and it is not right that the Board should be asked to say at this stage that the trial judge stopped the cross-examination.

Next, the statements to be made by the police officers as witnesses were not the sort of statements copies of which should, or need, be sent to the defence: reg. 11. There was here perfectly good evidence by the Malays supporting the charge which the judge and the assessors who saw them must have believed.

With regard to the statement made by the appellant, in any case, it was made "to" the inspector within the meaning of the regulation; the interpreter was a mere conduit pipe. It has never been suggested that the police officer was biased. That being so, this was in fact a statement made "to" an inspector although he did not understand it himself.

If that be wrong, then it is submitted that this is an irregularity which has been cured or waived by the fact that counsel for the accused said that he could not object to the statement. The arguments that have been put forward for the appellant would be very important in argument before a court of criminal appeal, but none of them shows that there has been a miscarriage or a denial of justice.

J. G. Le Quesne following. The omission to mention at the second trial the fact that the appellant had been acquitted at the first trial on the charge of being in possession of ammunition has not led to any injustice sufficient to bring the Board's jurisdiction in criminal matters into operation.

Scott Cairns K.C., in reply. If the evidence was that the appellant was not in a fit condition to make the alleged statement, it was the duty of the court itself to call medical evidence: *Mehr Singh and Banta* v. *The Crown* (1); *Jit Singh* v. *The Crown* (2). The failure to have any evidence from the prosecution to prove the condition of the appellant when making his statement was something which caused a grave miscarriage of justice. If the evidence of the Malays had stood alone, without the statement, one does not know whether there would have been a conviction or an acquittal here.

With regard to the expression "to" the inspector, all the arguments used in opening are equally applicable in that connexion.

The prosecution is bound to bring to the notice of the judge and the assessors the fact that there has been a previous trial; and, quite apart from any duty on the prosecution, it is clear that the previous acquittal was within the knowledge of the court, which should have directed the assessors that in those circumstances that part of the statement which was said to have been made in respect of having ammunition must be taken to be a statement of the accused admitting something which he was found not to have done. The acquittal is conclusive of the innocence of the appellant on that matter.

The point on the stopping of the cross-examination was mentioned at the hearing of the petition for special leave.

As to the form of the certificate, the case consisting of two charges is disposed of at the end of the first trial. It is conceded that the manner in which the certificate is signed makes it ambiguous, and the very fact that it is ambiguous makes it a bad certificate. This is a case in which there has been not a mere technical defect, but a real miscarriage of justice.

March 30. LORD SIMONDS announced that their Lordships would humbly advise His Majesty that the appeal should be allowed, and that they would give their reasons later.

May 10. The reasons of their Lordships for allowing the appeal were delivered by LORD MACDERMOTT, who stated the facts set out above and continued: In connexion with the

(1) (1917) A. I. R. (Lah.) 175.

(2) (1949) A. I. R. (E. Punj.) 334.

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decision of the Court of Appeal, it should be observed, first, that the grounds of appeal to the Court of Appeal were confined to points bearing on the value and weight of the evidence, the main ground being that "the statement of the accused "was recorded in a manner and in circumstances which makes "this statement valueless and irregular," and secondly, that many of the submissions on behalf of the appellant which their Lordships have had to consider were not advanced before either the Court of Appeal or the trial judge.

The second trial, like the first, was held without a preliminary inquiry on the basis that the relevant Trial Regulations continued to apply. The certificate given by Mr. McCall on November 25, 1948, was produced by the prosecution and relied on as justifying this procedure. The first point made on behalf of the appellant before the Board was that this certificate was then spent and no longer effective to authorize a trial under the Trial Regulations. It was contended that "the case" to which it related was not the case dealt with at the second trial, that the acquittal on the charge of being in possession of ammunition had produced a new situation which was substantially different from that considered by the Deputy Public Prosecutor when he certified, and that the second trial was irregular and without jurisdiction in the absence of a further certificate given after the acquittal and directed solely to the charge of carrying a firearm.

In the opinion of their Lordships, this point is without substance. "The case" in respect of which Mr. McCall certified is defined in his certificate as the trial of the appellant on the two charges therein specified. Regulation 7 of the Trial Regulations directed that the case thus certified should "be tried and disposed of in accordance with the provisions "of regs. 8 to 12 inclusive of these regulations." Their Lordships cannot regard the first trial as disposing of more than a part of the case as certified. The re-trial of the first charge was ordered according to law and the second trial was, in the view of the Board, as plainly within the words "shall "be tried and disposed of" as was the first trial. Different considerations would arise if, on its true interpretation, reg. 7 only enabled a certificate to be given in respect of a single charge. Their Lordships cannot, however, so construe the regulation. They see no reason why it should not apply to a case in which several charges may properly be joined for trial together. There is nothing in the Trial Regulations to cast doubt on this view; on the contrary, it finds strong support in reg. 8, sub-reg. 4, which empowers the Public Prosecutor in any emergency procedure case—that is a case certified under reg. 7—to alter or redraw the charge *or charges* or to frame an additional charge or charges.

The next point taken on behalf of the appellant was that Mr. McCall's certificate was from the beginning invalid and of no effect. This submission was based entirely on the words " for Solicitor-General " which appear below Mr. McCall's signature and following the description " Deputy Public " Prosecutor." It was urged that the certificate could not be regarded as that of Mr. McCall as he had purported to sign, not on his own account, but for the Solicitor-General, and, further, that it could not be treated as the certificate of the Solicitor-General as there was nothing to show that Mr. McCall had authority to act on his behalf.

Their Lordships think this objection ill-founded. They are satisfied from the opening words of the certificate that it was given by Mr. McCall in his capacity as a Deputy Public Prosecutor, and not as agent for the Solicitor-General, and that this appears so clearly that the words " for Solicitor-" General " may properly be regarded as mere surplusage and incapable of vitiating the document.

Another submission on behalf of the appellant, which may be conveniently considered now, was directed to the nature of the offence of carrying a firearm of which the appellant was convicted. It was contended that an intent to use the firearm in question as an offensive weapon, or to have it so used, was an essential ingredient of this offence and that the evidence fell short of establishing such intent. Several decisions of Indian courts were cited in support of this argument, but they relate to different enactments and their Lordships do not find them of assistance in determining the present point, which must depend on the true construction of reg. 4, sub-reg. 1, of the Emergency Regulations. The material words are: " Any person who carries . . . . any fire-arm, not being " a fire-arm which he is duly licensed to carry . . . . shall be " guilty of an offence . . . ." It was conceded on behalf of the Crown—and rightly, in their Lordships' opinion—that " carries " here means " carries to his knowledge," and that the carrying of a firearm by a person who did not know what he carried would not constitute an offence under this provision.

But the regulation says nothing of any special intent, and their Lordships are unable to find any ground on which such an intent should, as a matter of implication, be regarded as an element of the offence. The Emergency Regulations form a drastic code designed to meet a state of grave disorder and their Lordships see no reason to suppose that reg. 4, sub-reg. 1, was not intended to strike at the carrying of firearms simpliciter, if engaged in knowingly and without lawful authority.

Another of the grounds of appeal to their Lordships' Board arose out of a ruling given by Storr J. in the course of the second trial. It is thus stated in the appellant's printed case: "the said judge was in error in forbidding, during the course "of the cross-examination of an important prosecution witness, "the appellant's counsel to mention the fact that this was "a re-trial, and in thus preventing the veracity of that and "other witnesses being tested by reference to the earlier "statements they had made." The incident so referred to occurred during the cross-examination by Mr. Charry, the counsel assigned to the appellant, of one Abdul Aziz Bin Tampok, the third of the Malays to give evidence on behalf of the Crown. The relevant part of the judge's note is as follows:

> "Cross-examined—by Charry—The pistol in the Indian's "hand came from his waist. I thought it was definitely "a pistol. I cannot say if he drew something from his left "hand trouser pocket. I did not see. As far as I know "I did not see if he took out anything from his left trouser "pocket. I did not search him. I saw him draw the "pistol from his waist. I did not see well if there was "anything wrapped around the pistol when he drew it "from his waist.
>
> "(Charry mentions this is a re-trial. I inform him he "must not mention such a thing. Intld. P.S.)"

In relation to this aspect of the case their Lordships were referred to the evidence of the same witness as recorded at the first trial, and he seems then—that is, some nineteen days earlier—to have been positive that he had seen the appellant draw the revolver with his left hand from his left trouser pocket. It can hardly be doubted that Mr. Charry's cross-examination was conducted with the witness's previous testimony in mind and with a view to ascertaining how far he would adhere to it. The witness having departed from his earlier evidence as to what he saw the appellant do, Mr. Charry was entitled to cross-examine as to what the witness had said at the first trial so as to demonstrate to the court the fact and extent of the discrepancy. If this was what the learned judge intended to stop, he was wrong, and his intervention (which appears to have ended the cross-examination) may have prevented a full testing of the witness's credibility and powers of observation. But it is not clear that this was the nature of the ruling. The mere fact that there has been a previous trial is usually irrelevant and, therefore, inadmissible on a re-trial. This does not mean that it is never permissible to refer to an earlier trial, for it may well be necessary to do so to establish some relevant fact as, for example, in identifying the occasion on which some particular statement or admission was made. But it may be that Mr. Charry had made, or that the judge thought that he had made, some unjustifiable reference to the fact that the trial was a re-trial. The note does not settle the matter. The context suggests that Mr. Charry was working up to a reference to what the witness had sworn previously, but the words of the note—" Charry mentions "this is a re-trial " are capable of referring to more than this. Their Lordships find it impossible to be certain as to the precise nature of this incident, which was not mentioned in the grounds of appeal to the Court of Appeal and on which therefore they have not the benefit of the views of the judges who formed that court. But, even assuming that the judge intervened wrongly and so as to prevent this witness's credibility from being more fully tested, their Lordships are not satisfied, in the circumstances, that they would be justified in interfering with the verdict on this ground alone. Had it been felt at the time that the ruling had led or contributed to a miscarriage of justice their Lordships cannot but think that it would have been complained of on appeal to the Court of Appeal.

The remaining submissions advanced before the Board on behalf of the appellant all relate to a statement alleged to have been made by the appellant to the police on September 13, 1948, which was put in evidence by the Crown at the second trial. This is the statement already mentioned in referring to the main ground of appeal to the Court of Appeal. For an understanding of the issues raised regarding it the relevant facts and circumstances must now be stated in more detail.

The affray in which the appellant was wounded occurred about 10 a.m. on September 13, 1948. His injuries were not the subject of medical testimony, but it was not disputed that they were of a grave nature. At the second trial the Malay who disabled him described the wounding thus: "I stabbed him many times. The first time I stabbed on his "left forehead. The second time on the back, the third time "in the abdomen. By that time he was almost hopeless." And on cross-examination: "After I had stabbed three times "the accused fell down. After he fell down I stabbed him "some more." The appellant was left at the scene of the fight until the Malays returned with the Penghulu. He was then carried to Bukit Kepong and thence to the police station at Lenga where, according to the police evidence, he arrived about 4.30 p.m. From there he was taken to the hospital at Muar and there he remained until February, 1949, when he was fit enough to be brought before a magistrate.

At the first trial on March 2, 1949, the Crown led evidence on both charges. The principal witnesses were the three Malays, two of whom swore to seeing the appellant with a revolver. Saebun, the Malay who stabbed the appellant, said he had examined the revolver and that it was loaded with six bullets. He also deposed that four more bullets were found in a bag which he said the appellant was carrying. There can be no doubt that the charge in respect of the ten rounds of ammunition was based on the view that the appellant had possession of what was alleged to have been found in the revolver and in this bag. A police inspector named Krishnan was also produced to prove a statement taken from the appellant at Muar hospital on September 20, 1948, i.e., a week after the date of the alleged offences. The original of this statement was not forthcoming and Laville J. refused to admit a copy in evidence. No other statement of the appellant was referred to by the prosecution during the course of this trial, including the cross-examination of the appellant, who gave evidence on his own behalf.

At the second trial the principal witnesses were again the three Malays, but no attempt was made to prove the alleged statement of September 20, 1948. Instead, a statement purporting to have been made by the appellant on September 13, the day he was injured, was put in evidence for the first time, and two new witnesses, Abdullah Bin Omar, a senior inspector of police stationed at Muar, and Kasipellai Raja, a constable interpreter, were produced to prove it. According to these witnesses they visited the appellant in Muar hospital about 9 p.m. on September 13, with the

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permission of the medical authorities. He was in bed and was described by the inspector as clear minded and knowing what he was talking about. He was cautioned by the inspector and then was said to have made the statement quite voluntarily and without questioning. Later he was questioned, and his answers were written down. (These answers were not relied on by the Crown and do not form part of the record. They need not be mentioned again and references to the statement must be read as excluding them.) The statement was signed by the inspector, but not by the appellant. The evidence, however, was to the effect that after it had been made and recorded it was read back to the appellant who agreed that it was correct. The appellant speaks Tamil, but the inspector did not understand that language and the course pursued, according to his testimony and that of the interpreter, was that the latter translated what the appellant said into Malay and the inspector then wrote it down in English. The statement is a document of considerable length. It contains a detailed account of the appellant's movements from September 9, 1948, and of his contacts with Ah Kow, the Chinese who was killed. It then proceeds to deal with the events of September 13, 1948, and becomes to all appearance a frank confession not only of carrying a firearm but of being in possession of ammunition. As the terms of this statement were much canvassed it may be set out fully. It reads thus:

"Malayan Police.

"Statement during Investigation.

"Report No.: 11/48 Police Station: Lenga
"Statement of: Sivam Father's name: Narayanasamy
"Nationality: Indian; male Place of birth: India
"Age: 27 years Occupation: Ex-Tamil School
"Address: LU Club, Segamat Teacher J. L. Estate
"Taken by: Sr. Inspr. Abdullah
"at hospital on September 13, 1948, at 9.00 p.m.
"Interpreter: D.P.C. 823 from Indian-Malay into English.

"Before taking the statement Sivam was warned under the "Emergency Regulations, 1948, that whatever statement "given will be used as evidence for his trial.

"I was a clerk in the L.U. Segamat. When it was closed "I was left unemployed. About 1½ months ago I went to "Singapore to visit a friend whose name was Malachasamy, "a labourer of Municipal Singapore. He was staying at

"Block No. 28 Anderson Road. I stayed with him for "four days. Then I went to B.P. to see a friend by "the name of Kolandasamy. He was staying at the "L.U. Club B.P. On the same day I went to Muar and met "Mr. Parrerra at the L.U. Club Muar. I slept at the Club "for a night and then I went back to Segamat for some days.

"On September 9, 1948, I went to Muar and then by bus "to Pagoh. I arrived Pagoh at 6.00 p.m. on the same evening. "While I was standing on the five-foot way in front of a Chinese "coffee shop on the left side towards Lenga, I happened to "meet a Chinese whose name was Ah Kow. He was known "to me as a member of L.U. Club at Segamat. I did not "know his official duty of being a member at the Club but "I happened to meet him there always. On meeting me he "inquired me as to why I came to Pagoh. I told him that "I was looking for a job. He asked me to stay at Pagoh "that night as he wanted to find me a job in a chetty estate "at Segamat. After meeting me for a quarter of an hour "he then left and proceeded to Muar. Before leaving he "informed me that he would come and see me at Pagoh on "September 11, 1948. So that night I slept on the five-foot "way at Pagoh village.

"At about 9.00 a.m., 11/9/48, Ah Kow came to Pagoh and "met me at the same place where I first met him. He said "that he wanted to go to Segamat on September 13, 1948. "He invited me whether I like to accompany him to Segamat. "I replied that I agreed to accompany him. After telling "me this he went away. At about 3.00 p.m., 11/9/48, he "came again to see me again and asked me to accompany him. "I followed him by way to the right side of Pagoh village "through rubber estate and then came to a river. From "here he hired a sampan manned by an unknown Malay. "We then arrived at Bt. Kepong at 9.00 p.m. 11/9/48. When "arrived at Bt. Kepong we slept at a vacated hut in the "village. The next morning we went to a Chinese coffee "shop at Bt. Kepong. He told me to stay at the coffee "shop as he wanted to go to his house for his private business. "As there was no Indian in the village, I went round the "Malay Kampong for sight seeing and after that I came back "to the same coffee shop to drink. At about 12.00 n. Ah Kow "came to see me. He told me that he wanted to leave for "Segamat on 13.9.48. He then went away. I then returned "to the same vacated hut for the night. Ah Kow did not

" turn up on September 12, 1948. At 9.00 a.m. September 13, " 1948, he came to see me at the corner of the village taking " with him a guni sack containing something. He was accom- " panied by an unknown Chinese. We then walked through " a track towards a jungle for a distance of one mile and there " stopped. Ah Kow took out a revolver fully loaded and " handed over to me for my possession. He had also given " me another 6 rounds of life ammunitions as an extra and " at the same time he took out two cut rifles of which one was " given to the Chinese who had accompanied him, and the " other cut rifle was used by Ah Kow himself, I did not [know] " whether the two cut rifles were loaded but I saw about " 30 rounds of .303 life amms in the guni sack. After giving " the arms Ah Kow warned us to shoot anyone who tried to " obstruct our way. I put the revolver in my left-hand " trouser pocket. The two cut rifles were hung on each of " their shoulders while they were carrying, and could easily " be seen by anyone passing by. We then proceeded on the " track for another one mile where we happened to pass three " Malays who came from the opposite direction. After " passing us five or six steps the three Malays rushed on us. " The three Malays were armed with parangs. One of the " Malays rushed on Ah Kow, who then tried to shoot him. " The Malay then cut him with his parang. The other two " Malays attacked me and the other Chinese. Before I could " pull out my revolver from my trouser pocket to shoot him " I was punched by the Malay several times. I felt giddy " and fell down. The Malay took possession of my revolver " and then cut me with his parang several times. I did not " know what had happened to the other Chinese. The Malays " had taken the guni sack and escaped.

" At about 3.00 or 4.00 p.m. some Malays came to the scene " and arrested me. I was then taken to Muar Hospital.

" (Sgd.) Abdullah 13/9,
" C.R.O. Muar."

The appellant gave evidence and was the only witness called for the defence. His testimony amounted to a denial of carrying the revolver and of making the statement in question. He said that he lost consciousness on being stabbed, regained it two or three days later, and did not know what happened after he got to hospital. No evidence was called from the hospital staff as to the appellant's condition on admission. It is to be observed that counsel on either side referred to this

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in their addresses to the trial court at the conclusion of the evidence, Mr. Charry commenting on the fact as a defect in the Crown case and Mr. McCall replying that Mr. Charry could have called a doctor for the accused.

This last matter leads to a consideration of one of the two grounds on which their Lordships were asked to hold that the statement of the accused was inadmissible in law. It was said that reg. 11 of the Trials Regulations had not been complied with by the prosecution in that no statements of the evidence to be given by inspector Abdullah and the interpreter had been furnished to the accused or his advisers before the second trial. Regulation 11 reads as follows: "11. In every emergency "procedure case the prosecution shall, not less than two clear "days before the date fixed for the trial of the case, furnish "to the accused person or his advocate and solicitor, if any, "a copy of the statements made to the police during the "police investigation of all persons whom it is intended to "call as witnesses for the prosecution at the trial."

Their Lordships will assume, in dealing with this argument, that the witnesses in question made statements to their superiors as to the taking of a statement from the appellant. If so, the case would seem to fall within reg. 11 for, as was indeed conceded, its terms are wide enough to apply to police witnesses. Their Lordships will also assume that, as regards these witnesses, the prosecution failed to comply with this regulation. There is nothing in the record to indicate that it did comply. It is true that the judge's note shows that at the commencement of the trial Mr. McCall stated that he proposed putting in a statement of the accused taken by a police officer and had served Mr. Charry with a copy, and Mr. Charry is recorded as saying, "I have duly received a copy." This, however, does not refer to the statements of those in a position to depose as to the circumstances in which the accused made his statement and, apart from any question of length of notice, cannot be regarded as satisfying the requirements of reg. 11.

On these assumptions two questions arise. The first is whether, as counsel for the appellant contended, compliance with reg. 11 is a condition precedent to the reception of the evidence concerned. In the opinion of the Board it is not. Their Lordships consider the regulation to be directory in character and not such as to preclude the trial judge, in the exercise of his discretion, from admitting testimony in respect of which the requisite notice has not been given. That, it must be added, is not to say that the provisions of the regulation are to be regarded lightly, or that failure to comply therewith cannot imperil a verdict favourable to the prosecution. Regulation 11 was obviously intended for the protection of an accused person against surprise and to afford him at least some of the advantages provided under the normal procedure by the preliminary inquiry. While failure to observe the regulation is to be regarded as an irregularity rather than a fundamental defect, evidence tendered in breach of its requirements ought not to be admitted readily or so as to deny the accused any real benefit which compliance would have conferred. The second question is whether this irregularity can in itself be said to have caused a miscarriage of justice.

The appellant has not satisfied their Lordships that it had this result. It was submitted that had due notice been given the defence might have produced medical or other evidence to show that the accused was not in a fit condition to make a statement on the evening of September 13, or that no statement had then been taken. In the somewhat unusual circumstances of this case it is regrettable that the court had not before it some evidence from the hospital as to the appellant's mental and physical state on the evening of the day on which he was injured and during which he must, on any view, have suffered a very considerable degree of exhaustion and shock. But their Lordships are not in a position to say whether such evidence was available or could have been obtained by the time of the second trial. Half a year had then elapsed since the crucial date and local conditions may have been far from normal. It may or may not be the case that both prosecution and defence were faced with similar difficulties in this respect. But it is certainly not clear that compliance with reg. 11 would have enabled the appellant to muster witnesses for this purpose. And, apart from that, it must be observed that the admission of the statement does not appear to have been resisted on this ground. Nor was any adjournment sought by the defence, or any point based on a breach of reg. 11 taken before the Court of Appeal. Once again their Lordships cannot but feel that had the irregularity aroused any substantial sense of grievance at the time the matter would have been ventilated at a much earlier stage.

The next submission as to the admissibility of the statement was based on reg. 33, sub-reg. 1, of the Emergency Regulations which, in so far as material, is as follows: " 33.—(1.) Where

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" any person is charged with any offence against these regulations or with any offence specified in the Schedule to these " Regulations, any statement, whether such statement " amounts to a confession or not or is oral or in writing, made " at any time, whether before or after such person is charged " and whether in the course of a police investigation or not " and whether or not wholly or partly in answer to questions, " by such person to or in the hearing of any police officer of " or above the rank of inspector shall, notwithstanding anything to the contrary contained in any written law, be " admissible at his trial in evidence and, if such person tenders " himself as a witness, any such statement may be used in " cross-examination and for the purpose of impeaching his " credit : "

The contention here was that the statement had not been made " in the hearing of " Inspector Abdullah, as he was unable to understand the language spoken by the appellant, and consequently, that it should not have been received in evidence. Their Lordships are of opinion that this argument must fail. They do not find it necessary to consider the precise meaning of the words referred to as those which immediately precede them provide an alternative, and they are satisfied on the evidence that if the statement was made it was made " to " the inspector and none the less so because he required the services of the interpreter to follow what was said.

The remaining submissions advanced on behalf of the appellant related to the weight to be attached to the statement which he is alleged to have made. It may truly be said that the circumstances already mentioned were such as to provoke comment and even suspicion about the taking and content and belated production of this important part of the prosecution's case. But the weighing of evidence is essentially a matter for the trial court and it is not the practice of their Lordships' Board, in the exercise of its criminal jurisdiction, to usurp this function or to interfere with a verdict reached after a satisfactory trial merely on the ground that evidence sufficient to permit of the verdict ought not to have prevailed. Their Lordships have no desire to depart from this practice, which recognizes the difficulty of assessing evidence at a distance from the scene and without the intimate knowledge of local conditions possessed by the responsible courts of the country concerned. But there is one feature of the present case which must now be mentioned and which, though it bears directly on the weight to be accorded to the statement under discussion, involves an important principle of the criminal law to such an extent that, in the opinion of the Board, the conviction appealed from ought not to be allowed to stand.

The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other.

These considerations do not appear to have received the attention they deserved at the second trial. Thus one of the police witnesses (P.W.5) was re-examined so as to elicit the fact that the revolver concerned was loaded with 6 rounds; and in his summing-up, Storr J., in reference to a point made by Mr. Charry, told the assessors to dismiss the question of ammunition from their minds, though it would seem that Mr. Charry's submission was, in effect, a suggestion that the person responsible for the ammunition might well be the person responsible in respect of the revolver that could fire it; and that, whatever may be said of its cogency, was an argument which the acquittal had made a possible line of defence.

More important than these matters, however, was the reliance of the prosecution on the statement of September 13, which, if accepted as the truth, went to prove the appellant guilty of the charge of which he had been acquitted as clearly as it proved him guilty of the offence the subject of the second

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trial. This circumstance might well have been made a ground for excluding the statement in its entirety, for it could not have been severed satisfactorily. But the point was not taken and the statement was left to the assessors, with ample warning, it is true, of the dangers of acting on a retracted confession, but without any intimation that the prosecution could not assert, or ask the court to accept, a substantial and important part of what it said.

The fact appears to be—and the Board must judge of this from the record and the submissions of counsel who argued the appeal—that the second trial ended without anything having been said or done to inform the assessors that the appellant had been found not guilty of being in possession of the ammunition and was to be taken as entirely innocent of that offence. In fairness to the appellant that should have been made clear when the statement had been put in evidence, if not before. Their Lordships do not attempt to attribute or apportion responsibility for the omission. They do not know how far, if at all, the judge's earlier ruling as to mention of the fact that the trial was a re-trial may have discouraged counsel from referring to the previous proceedings; and they are uncertain from the record whether the judge was himself aware of the acquittal. But they cannot avoid the conclusion that the effect of the omission was to render the trial unsatisfactory in a material respect. Had the assessors realized that only a part of the statement could be relied on, they might have attached greater weight to the other criticisms regarding it and rejected it altogether. And had they done so it by no means follows that they would have been prepared to accept the testimony of the Malays in preference to that of the appellant. What they would have done had the statement been excluded from evidence or its effect qualified by an unequivocal direction as to the appellant's acquittal and the effect thereof must, of course, remain a matter of conjecture. But the uncertainties are sufficiently reasonable to jeopardize the verdict reached and to justify the view, already expressed, that it ought not to stand.

For these reasons their Lordships have humbly advised His Majesty that the appeal should be allowed and the conviction and sentence set aside.

Solicitors: *Stanley Johnson & Allen; Burchells.*

[PRIVY COUNCIL]

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M.R.M.M.M.N. NADARAJAN CHETTIAR . APPELLANT;

AND

C.H.M.R.M.W.T. WALAUWA MAHATMEE AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Moneylender—Closed transaction—Action for relief maintainable—Decisions of English Court of Appeal on identical statutory language—Rightly followed by Ceylon courts—Ceylon Money Lending Ordinance, 1918 (*R. S.* 1938, *c.* 67), *s.* 2, *sub-ss.* 1, 2.

An action by a borrower claiming relief under s. 2, sub-s. 2, of the Money Lending Ordinance, 1918, of Ceylon (which is in language identical with s. 1, sub-s. 2, of the English Money-lenders Act, 1900) lies although the loan has been repaid and the money-lending transaction has been closed before the date of his application for relief.

Saunders v. *Newbold* [1905] 1 Ch. 260; *Part* v. *Bond* (1906) 22 T. L. R. 253; and *Kerman* v. *Wainewright* (1916) 32 T. L. R. 295, in which the right of a borrower to re-open a closed transaction under s. 1, sub-s. 2, of the English Money-lenders Act was recognized by the English Court of Appeal, referred to.

While it is one thing to presume, as is the accepted rule, that a local legislature, when re-enacting a former statute, intends to accept the interpretation which has been placed on that statute by local courts of competent jurisdiction, with whose decision the legislature must be taken to be familiar, it is quite another thing to presume that a legislature, when it incorporates in a local Act the terms of a foreign statute, intends to accept the interpretation placed on those terms by the courts of the foreign country. There is no presumption that the people of Ceylon know the law of England, and, in the absence of any evidence to show that the legislature of Ceylon at the relevant date knew, or must be taken to have known, the decisions of the English courts under the Money-lenders Act, there is no basis for imputing to the legislature an intention to accept those decisions.

The courts in Ceylon, however, acted correctly in following the decision of the English Court of Appeal on the construction of words identical with those used in the Ceylon Ordinance.

Rule in *Trimble* v. *Hill* (1879) 5 App. Cas. 342, 344, approved.

Judgment of the Supreme Court of Ceylon affirmed.

**Present:* LORD PORTER, LORD OAKSEY, LORD RADCLIFFE, SIR JOHN BEAUMONT, and SIR LIONEL LEACH.

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APPEAL (No. 33 of 1949) from a judgment of the Supreme Court of Ceylon (February 18, 1948) dismissing an appeal from a judgment of the District Court of Colombo (March 25, 1946).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee. The action out of which this appeal arose was brought by the respondents, who were husband and wife, as plaintiffs, against the appellant, who was a moneylender, as defendant, to have certain moneylending transactions re-opened and for an account. The trial judge decided that the transactions ought to be re-opened, that they were harsh and unconscionable, and that they had been induced by undue influence. He directed an account to be taken between the respondents and the appellant, and, on the account being taken, found that the appellant ought to repay to the respondents the sum of Rs.33,095.56, and entered judgment accordingly.

So far as is necessary for the determination of this appeal the history of the matter was as follows. In the year 1936 a loan was made by the appellant to the respondents on security and on certain terms as to repayment. In the year 1938 there was a further moneylending transaction between the parties, and it was conceded that the loans of 1936 and 1938 formed one moneylending transaction. On March 9, 1940, the respondents, after raising Rs.60,000 elsewhere, paid off the sum claimed by the appellant, which then amounted to Rs.28,202.35. It must be emphasized that that payment was made voluntarily at the instance of the borrowers, and that the closing of the transaction was not brought about by the lender.

On July 1, 1940, the respondents filed the action out of which this appeal arose, claiming relief under the Money Lending Ordinance, 1918, of Ceylon (c. 67 of the Revised Statutes, 1938). The substance of the claim in the plaint was that the moneylending transactions of 1936 and 1938 should be re-opened, an account taken, and payment made to the respondents of anything found to be due. The trial took place before R. F. Dias as District Judge of Colombo. A large number of issues were framed, of which No. 19 was in the following terms: "(19.) Can plaintiffs maintain this action "to re-open the transactions upon Bonds Nos. 1624 of 11.7.36 "and 4664 of 19.2.38, as no sums are claimed to be due to the "defendant thereon at the date of action?" By agreement

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between the parties that issue was decided as a preliminary point of law, the judge assuming for the purposes of the argument that the facts stated in the plaint were correct. On August 4, 1941, in a considered judgment, the judge answered issue No. 19 in the affirmative, holding that the action of the respondents lay although the account had been closed.

The appellant appealed against the judgment of the trial judge, and the appeal was heard by the Supreme Court on June 29, 1942, when that court dismissed the appeal, the judges, however, giving no reasons for their decision.

The action thereupon proceeded on the facts and was tried by the District Judge on March 9, 1943, and following days. On April 9, 1943, the judge gave judgment in favour of the respondents and directed that an account should be taken of the transactions between the appellant and the respondents on the basis of his judgment. The appellant appealed to the Supreme Court against the latter judgment of the District Judge and his appeal was dismissed by the Supreme Court on July 25, 1944, the judges again giving no reasons for their decision.

The action then proceeded in the District Court on the account directed, and in the result the judge held the respondents (plaintiffs) to be entitled to the sum of Rs.33,095.56 and gave judgment for that amount accordingly.

The appellant appealed against the last-mentioned judgment of the District Court, and on February 18, 1948, the appeal was dismissed, the judges once more giving no reasons for their decision. The present appeal was against that decision, which was the final judgment in the action.

By the Money Lending Ordinance, 1918, of Ceylon (R. S. 1938, c. 67):—

" 2.—(1.) Where proceedings are taken in any court for " the recovery of any money lent after the commencement " of this Ordinance, or the enforcement of any agreement or " security made or taken after the commencement of this " Ordinance in respect of money lent either before or after the " commencement of this Ordinance, and there is evidence " which satisfies the court—

" (*a*) that the return to be received by the creditor over " and above what was actually lent (whether the same is " charged or sought to be recovered specifically by way of " interest, or in respect of expenses, inquiries, fines, bonuses, 1950

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"premia, renewals, charges, or otherwise), having regard "to any sums already paid on account, is excessive, and "that the transaction was harsh and unconscionable, or, "as between the parties thereto, substantially unfair; or

"(*b*) that the transaction was induced by undue influence, "or is otherwise such that according to any recognized "principle of law or equity the court would give relief; or

"(*c*) that the lender took as security for the loan a promissory note or other obligation in which the amount "stated as due was to the knowledge of the lender fictitious, "or the amount due was left blank,

"the court may re-open the transaction and take an account "between the lender and the person sued, and may, notwithstanding any statement or settlement of account or any "agreement purporting to close previous dealings and create "a new obligation, re-open any account already taken between "them, and relieve the person sued from payment of any "sum in excess of the sum adjudged by the court to be fairly "due in respect of such principal, interest, and charges as the "court, having regard to the risk and all the circumstances, "may adjudge to be reasonable; and if any such excess has "been paid or allowed in account by the debtor, may order "the creditor to refund it; and may set aside, either wholly "or in part, or revise, or alter any security given or agreement "made in respect of money lent, and if the lender has parted "with the security may order him to indemnify the borrower "or other person sued.

"(2.) Any court in which proceedings might be taken for "the recovery of money lent shall have and may, at the "instance of the borrower or surety or other person liable, "exercise the like powers as may be exercised under the last "preceding sub-section, and the court shall have power, "notwithstanding any provision or agreement to the contrary, "to entertain any application under this Ordinance by the "borrower or surety or other person liable, notwithstanding "that the time for repayment of the loan or any instalment "thereof may not have arrived."

1950. May 9, 10, 11. *Barton K.C.* and *Gahan* for the appellant. The question is whether under the Ceylon Money Lending Ordinance the court has power to re-open transactions which have been closed by payment before the date of the application for relief, or whether the Ordinance only empowers

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the re-opening of current transactions. It is submitted that it only empowers the re-opening of transactions which have not been closed. The other questions raised are as to the nature and extent of undue influence and what constitutes a harsh and unconscionable transaction. The Ceylon Money Lending Ordinance is almost identical in s. 2, sub-ss. 1 and 2, with the English Money-lenders Act of 1900. Section 2, sub-s. 1—and this is the crux of the matter—concerns, and concerns only, a transaction on which the lender has brought proceedings. The preliminary to its operation is the bringing of proceedings, and there is nothing in it to extend to any other transaction. It is not a general charter to re-open a transaction. Sub-section 2 of s. 2 is merely a counterpart of sub-s. 1. The whole effect of sub-s. 2 is to give to the person who will, or may, have to pay under the transaction an opportunity of going to the court notwithstanding that the transaction has not become performable, notwithstanding that the lender's right to sue has not accrued, and ask the court to say how far he is liable under the transaction.

With regard to the words of the Ordinance, first, the words " might be taken " in sub-s. 2 of s. 2 are entirely inappropriate to a closed transaction, and they are the basis of the sub-section. Secondly, sub-s. 1 of s. 2 refers to the power of the court to re-open current transactions, and " the like powers " in sub-s. 2 must be to re-open such transactions as the court can re-open. When everything is paid off that transaction is finished, and there is no connexion between it and any subsequent advance. Further, when a transaction has been closed there is no " borrower or surety or other person liable." Those words in sub-s. 2 point very strongly to existing contracts in respect of which it can be said " he is the borrower, he the surety " and he is liable," and those words are inappropriate to a transaction which has been closed and in which there is no liability whatever. The remedy in sub-s. 2 is not a general power, but one to protect a borrower who is presently harassed or still in danger of being harassed. It is also impossible to contend that the last words of sub-s. 2, " notwithstanding that the time for repayment of the loan or any " instalment thereof may not have arrived," refer to anything else but an open transaction—they are quite inappropriate to a transaction which has been closed. Lastly, on construction, sub-s. 3, with sub-s. 1, shows a clear intention in the legislature

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to confine the operation of the statute to existing transactions, and not to give power to re-open transactions which have been closed for years.

The Court of Appeal in England in *Saunders* v. *Newbold* (1) expressed the view that s. 1, sub-s. 2, of the English Money-lenders Act, 1900, which corresponds to s. 2, sub-s. 2, of the Ceylon Ordinance, applies even to a case where the loan has been repaid. Although he considered the observations of the Court of Appeal to be obiter dicta, the District Judge in this case thought that he should follow them. When *Saunders* v. *Newbold* (1) went to the House of Lords (2) there was no discussion of the point now before the Board.

On the question of the alleged undue influence there is no conflict of evidence ; it is submitted that it lacks the essential elements which are necessary to establish a case of undue influence under the Ordinance. Undue influence must be confined to having influence which enables the mind of the borrower to be dominated ; there must be something which deprives him of the power of exercising his free will in the matter ; the question of the borrower's necessity does not arise. There is here no case of undue influence at all: *Murray* v. *Bush* (3) ; *Williams* v. *Bayley* (4) ; *Allcard* v. *Skinner* (5) and *Mutual Finance, Ld.* v. *John Wetton & Sons, Ld.* (6).

Gahan following. Sub-section 2 of s. 2 is the counterpart of sub-s. 1, and the words are apt, and apt only, to deal with a continuing liability where there is a possibility of proceedings by the borrower. The legislature was not concerning itself in any way with closed transactions. That is abundantly clear from the last words of sub-s. 2. This submission, of course, runs contrary to *Saunders* v. *Newbold* (1); but it is submitted that the reasoning which gives the section the construction now contended for is to be preferred to that of the Court of Appeal in *Newbold's* case (1). On the question whether or not there is material on which the judge could properly hold that the transactions in this case were harsh and unconscionable, there was no evidence which justified the judge in saying that the respondents were in such dire need that they could not do anything but agree to the terms that were demanded of them. [Reference was made to *Samuel* v. *Newbold* (1) and *Carringtons, Ld.* v. *Smith* (2).]

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(1) [1905] 1 Ch. 260.

(2) [1906] A. C. 461.

(3) (1873) L. R. 6 H. L. 37, 48–9.

(4) (1866) L. R. 1 H. L. 200, 218–9.

(5) (1887) 36 Ch. D. 145, 181.

(6) [1937] 2 K. B. 389, 394.

R. O. Wilberforce for the respondents. The interpretation which was put on the Ordinance by the courts below, following the interpretation put on the same words by the English Court of Appeal, was right. It is purely a matter of construction. In any case, and as an alternative, it is submitted that even though there might be an alternative construction which, if the matter were res integra, the Board might be disposed to adopt, where a Colonial court in interpreting a Colonial enactment has placed on it the same construction as that placed on an Imperial Statute in the same terms by the English Court of Appeal, the Board will be very slow indeed to depart from that construction and will only do so if satisfied that it is plainly wrong.

The first submission is that the existence of the court's jurisdiction under sub-s. 2 of s. 2 is not in any way dependent on the subsistence at the time of action brought of a debtor-creditor relationship. The only alternative to that is the proposition advanced for the appellant that the two sub-sections are literally counterparts one of the other, and that the limitations in the one must be read into the other. That would have this consequence, that proceedings cannot be taken under s. 2, sub-s. 2, for relief unless there is some liability outstanding. That means that a borrower cannot pay the last payment and then sue for relief, and that is a limitation on the jurisdiction which was not intended to be conferred. He is entitled to pay off the money owed and then bring an action, and that was what was held by the English Court of Appeal. Another consequence, to which attention was drawn by the Court of Appeal in *Saunders* v. *Newbold* (3), is that the appellant's construction would cut down the former jurisdiction that was vested in the courts: 63 & 64 Vict., c. 51. Further, the limitation which the appellant seeks to put on sub-s. 1, namely, that it is limited to open transactions, derives, of course, simply from the fact that the lender is the person suing, and it must necessarily be an open transaction. There is, however, no reason why the same limitation should be imported in sub-s. 2 when the borrower is suing.

Words in sub-s. 2 which it is conceded present difficulty are "the borrower or surety or other person liable." It is

(1) [1906] A. C. 461, 469-70.
(2) [1906] 1 K. B. 79.
(3) [1905] 1 Ch. 260.

submitted, however, that to presuppose an existing liability does unnecessarily restrict the wording of the sub-section, and that the English Court of Appeal, reading these words and interpreting the Act as an amplifying Act intended to give wide jurisdiction to relieve debtors against the consequences of their improvidence, quite rightly construed the words in a benevolent sense rather than in a restrictive sense; and it is submitted that it is perfectly possible to do so. It is admitted at once that the words at the end of sub-s. 2 are referring only to an open transaction, but they have no value whatever in the interpretation of the previous part of the sub-section; they are not exhaustive and do not define the only cases in which relief can be asked for; they were inserted because it was necessary to provide for a case of future instalments. The words " the like powers " have no relevance on the question whether the transaction is to be open or not. It is conceded that s. 3 only concerns open transactions. The interpretation placed on this Ordinance by the courts below was correct.

As already submitted, the Board ought to be very slow in the circumstances of this case to reverse that interpretation. The view of the Court of Appeal in *Saunders* v. *Newbold* (1) goes far beyond mere obiter dictum, and is an authoritative interpretation by the court of the Imperial Statute. That pronouncement of the law has in fact been followed and adopted by the English courts: *Part* v. *Bond* (2); *Kerman* v. *Wainewright* (3) and *B. S. Lyle, Ld.* v. *Pearson* (4), in the last of which reference is made to an unreported case bearing on the matter. The courts in Ceylon were right in interpreting the Ceylon Ordinance in the same way as the Court of Appeal did the English Act: *Trimble* v. *Hill* (5). Secondly, the Ceylon Ordinance having been passed after the English Moneylenders Act, 1900, had been construed by the Court of Appeal in 1905, the Ceylon legislature must be taken to have introduced the English interpretation into the law of Ceylon: *Ex parte Campbell* (6); *Colchester Brewing Co., Ld.* v. *Tendring Licensing Justices* (7); *Lamb* v. *Cleveland* (8) and *Risler* v. *Alberta Newspapers, Ld.* (9).

Counsel was not required to argue the points arising on

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(1) [1905] 1 Ch. 260.
(2) (1906) 22 T. L. R. 253.
(3) (1916) 32 T. L. R. 295.
(4) [1941] 2 K. B. 391, 393.
(5) (1879) 5 App. Cas. 342, 344.
(6) (1870) L.R. 5 Ch. 703, 706.
(7) [1916] 2 K. B. 126, 135.
(8) (1890) 19 S. C. R. (Can.) 78, 103.
(9) [1919] 2 W. W. R. 326, 329.

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the evidence—whether there had been undue influence and whether the transactions were harsh and unconscionable.

Barton K.C. in reply. There cannot here be inferred an intention in the Ceylon legislature to embody the effect of the decision in the English case. [Reference was made to *Strimathoo Moothoo Vigia and Others* v. *Dorasinga Tever* (1) and *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ld.* (2).]

June 21. The judgment of their Lordships was delivered by Sir JOHN BEAUMONT, who stated the facts set out above and continued: Before the Board the appellant has challenged not only the answer to issue No. 19, which raises a question of law based on the construction of the Money Lending Ordinance, but the findings of the courts in Ceylon that the loans made to the respondents were harsh and unconscionable and induced by undue influence. In their Lordships' view there was ample evidence to support the finding of the trial judge, confirmed in appeal, that the loans of 1936 and 1938 were harsh and unconscionable, and their Lordships see no reason for departing from their normal practice of not interfering with concurrent findings of fact. In this view of the matter it is unnecessary to consider the arguments presented to the Board that there was no evidence to support the finding of undue influence. If the loans made by the appellant were in fact harsh and unconscionable, it matters not that the respondents were free from the influence of the appellant.

The important question which falls for determination is whether a borrower is entitled to relief under the Money Lending Ordinance in respect of money-lending transactions closed before the date of his application for relief. It is to be regretted that in considering this question, which is one of some importance, their Lordships have not the advantage of knowing the reasons on which the judges in the Supreme Court acted in dismissing the appeal against the judgment of the District Judge of August 4, 1941. The question at issue turns on the construction of s. 2, sub-ss. 1 and 2. of the Money Lending Ordinance, 1918, which are in the following terms:

[His Lordship set out s. 2, sub-ss. 1 and 2, and continued:] Section 2 reproduces s. 1 of the English Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2, sub-s. 2, of the

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(1) (1875) L. R. 2 I. A. 169. (2) [1933] A. C. 402.

Ceylon Ordinance being expressed in language identical with that of s. 1, sub-s. 2, of the English Act. The argument of the appellant is that relief under s. 2, sub-s. 1 can only be given in the course of a current transaction since the sub-section only comes into operation when proceedings are taken in any court for the recovery of money lent. Sub-section 2 is merely a counterpart of sub-s. 1, enabling the borrower to claim relief without waiting for the lender to sue for his money, and even before the money is due; but the relief can only be claimed in the course of a current transaction since the court which can grant relief must be one in which proceedings might be taken for the recovery of money lent; and relief can only be granted at the instance of the borrower, surety or other person liable. If the loan has been repaid and the transaction closed, there is, so the argument runs, no money lent, no court in which proceedings might be taken for the recovery of money lent and no borrower, surety or other person liable. Certainly there is force in this argument, and it must be conceded that if the section applies to closed transactions some words must be read into it to cover a claim in a court in which proceedings might have been taken for the recovery of money lent, if the money had not been repaid, at the instance of a former borrower, surety or other person who had been liable. The contention of the respondents is that some such words ought to be read into the section to give effect to the intention of the legislature to be gathered from a consideration of the Ordinance as a whole. It is suggested that the legislature can hardly have intended that a borrower, so long as a single instalment of his debt remains due, is to have the right to claim relief and open settled accounts, whilst, when the last instalment has been repaid, he is to lose all his rights. Further, that a literal construction of the sub-section would lead in many cases to very difficult questions as to whether a transaction was in fact closed, or whether the closure was a mere device to enable the moneylender to escape liability, moneylenders being notoriously a class skilled in adapting legal forms to their own advantage.

The District Judge in his judgment stated that had the matter been at large he would have felt disposed to accept the argument advanced on behalf of the moneylender and to hold that the action of the borrower did not lie, but in deference to the decision of the English Court of Appeal in

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Saunders v. *Newbold* (1) he held that the plaintiffs could re-open a closed account. *Saunders* v. *Newbold* (1) was a considered judgment of the English Court of Appeal in which the court expressed the view that a borrower was entitled to open a closed transaction under s. 1, sub-s. 2, of the Money-lenders Act. The court did not, in that case, give relief in the closed transaction since the borrower had made no application to the court so to do, but the court gave him liberty to make such an application if so advised. The decision of the Court of Appeal was affirmed in the House of Lords (2) but without any discussion on the construction of s. 1, sub-s. 2, of the Money-lenders Act, though the liberty granted to the borrower by the Court of Appeal was expressly saved. The learned District Judge considered that the opinion of the Lords Justices on the effect of s. 1, sub-s. 2, was really obiter, but this is of little consequence since the right of a borrower to re-open a closed transaction under s. 1, sub-s. 2 of the Money-lenders Act, has been recognized in later cases in the English Court of Appeal (see *Part* v. *Bond* (3) and *Kerman* v. *Wainewright* (4)).

Mr. Wilberforce, for the respondents, in the first instance contended that the legislature in Ceylon by employing in s. 2, sub-s. 2 of the Money Lending Ordinance the exact words used in the English Money-lenders Act, must be taken to have accepted the construction placed on these words by courts of competent jurisdiction in England. He relied on the rule stated by Sir W. James L.J., in *Ex parte Campbell* (5) that "Where once certain words in an Act of Parliament have "received a judicial construction in one of the superior courts, "and the legislature has repeated them without any alteration "in a subsequent statute, I conceive that the legislature "must be taken to have used them according to the meaning "which a court of competent jurisdiction has given to them."

This rule has been acted on frequently in the English courts and was approved by the House of Lords in *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ld.* (6). Probably in suitable cases the rule would be applied in Ceylon, as it has been in India (see *Strimathoo Moothoo Vijia and Others* v. *Dorasinga Tever* (7). It is, however, one thing to presume that a local

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(1) [1905] 1 Ch. 260.
(2) [1906] A. C. 461.
(3) 22 T. L. R. 253.
(4) 32 T. L. R. 295.
(5) L. R. 5 Ch. 703.
(6) [1933] A. C. 402.
(7) (1875) L. R. 2 I. A. 169.

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legislature, when re-enacting a former statute, intends to accept the interpretation placed on that statute by local courts of competent jurisdiction with whose decision the legislature must be taken to be familiar ; it is quite another thing to presume that a legislature, when it incorporates in a local Act the terms of a foreign statute, intends to accept the interpretation placed on those terms by the courts of the foreign country with which the local legislature may or may not be familiar. There is no presumption that the people of Ceylon know the law of England, and in the absence of any evidence to show that the legislature of Ceylon at the relevant date knew, or must be taken to have known, decisions of the English courts under the Money-lenders Act, there is no basis for imputing to the legislature an intention to accept those decisions.

Mr. Wilberforce was on safer ground when he contended that it was the duty of courts in Ceylon to follow the decision of the English Court of Appeal on the construction of words identical with those used in a Ceylon Ordinance. In *Trimble* v. *Hill* (1) the Board expressed this opinion : " Their Lordships " think the court in the colony might well have taken this " decision [i.e., a decision of the English Court of Appeal] " as an authoritative construction of the statute . . . . Their " Lordships think that in colonies where a like enactment " has been passed by the Legislature the Colonial Courts " should also govern themselves by it." This, in their Lordships' view, is a sound rule, though there may be in any particular case local conditions which make it inappropriate. It is not suggested that any such conditions exist in the present case, and the courts in Ceylon acted correctly in following the decision of the English Court of Appeal.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors : *Peake & Co. ; P. S. Martensz.*

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(1) 5 App. Cas. 342, 344.

[PRIVY COUNCIL]

H. E. WIJESURIYA . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR CEYLON . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

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Ceylon—Contract—Crown lands—Oral agreement giving right to produce of rubber trees—Whether "permit" a lease or a licence—"Exclusive "possession" the decisive test—Non-compliance with statutory provision requiring agreement to be in writing—Validity—Prevention of Frauds Ordinance (*R.S.*, *c.* 57), *ss.* 2, 17.

While there were particular provisions in a "permit" to be given to the appellant "to tap and take the produce of the rubber "trees" on certain Crown lands which pointed to the permit being either a lease or a licence, the decisive test was whether on its true construction the effect of the document was to give exclusive possession to the holder of the permit. All that was granted by the document was the right to tap and take the produce of the rubber trees within a defined area, with such rights of occupation or possession and other ancillary rights as were necessary to make the primary right effective. There was nothing in the document which would exclude the Crown or its officers from entering on, and making such use of, the land as might be thought fit, subject only to the limitation that in doing so they must not derogate from the rights granted to the appellant; and accordingly the permit was not a lease but a licence.

Section 17 of the Prevention of Frauds Ordinance of Ceylon concerns instruments, that is, transactions which have already been reduced to writing, and exempts certain classes of instruments from the necessity of notarial attestation.

There is nothing in that section which saves oral agreements for the sale of immovable property by Government from the necessity of being reduced to writing and notarially attested as prescribed by s. 2 of the Ordinance.

Decree of the Supreme Court of Ceylon (1946) 47 C. N. L. R. 385, affirmed.

**Present:* LORD SIMONDS, LORD MACDERMOTT, LORD REID and SIR JOHN BEAUMONT.

APPEAL (No. 75 of 1947) from a decree of the Supreme Court of Ceylon (Soertsz Ag.C.J. and Cannon J.) (August 22, 1946) which set aside a decree of the District Court of Colombo (November 3, 1944) and dismissed the appellant's action against the respondent for damages for an alleged breach of contract.

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The appellant's plaint alleged that on or about March 5, 1943, the Government Agent on behalf of the Crown agreed to lease to the appellant the right to tap and take the produce of the rubber trees on specified Crown lands for four years and two and a half months at a yearly rental of Rs. 6,000, possession of the land to be given to the appellant on March 15, 1943. The plaint then alleged that the appellant had on March 5, 1943, deposited with the Government Agent Rs. 6,000, being the rent for the first year, but that the Government Agent had broken the agreement by not granting a lease or giving possession to the appellant. The appellant claimed from the respondent, as representing the Crown, Rs. 75,000 as damages and the return of Rs. 6,000 with interest at nine per cent. a year from March 15, 1943, until judgment.

The respondent by his answer denied any agreement, and pleaded that the agreement alleged was invalid and unenforceable under the Prevention of Frauds Ordinance and the Land Sales Regulations of Ceylon. In his answer he further pleaded that the appellant had deposited Rs. 6,000 in anticipation of his obtaining a lease if and when the lands were vacated by one Sabapathipillai, then under a notice to quit which was cancelled on March 11, 1943, whereupon an order was made for the return to the appellant of the deposited Rs. 6,000, which could have been withdrawn at any time thereafter.

By s. 2 of the Prevention of Frauds Ordinance: "No "sale, purchase, transfer, assignment, or mortgage of land "or other immovable property, and no promise, bargain, "contract, or agreement for affecting any such object, or for "establishing any security, interest, or incumbrance affecting "land or other immovable property (other than a lease at "will, or for any period not exceeding one month), nor any "contract or agreement for the future sale or purchase of any "land or other immovable property, shall be of force or avail "in law unless the same shall be in writing and signed by "the party making the same, or by some person lawfully "authorized by him or her in the presence of a licensed notary "public and two or more witnesses present at the same time, "and unless the execution of such writing, deed, or instrument "be duly attested by such notary and witnesses."

By s. 17: "None of the foregoing provisions in this "Ordinance shall be taken as applying to any grants, sales,

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"or other conveyances of land or other immovable property "from or to Government, or to any mortgage of land or "other immovable property made to Government, or to any "deed or instrument touching land or other immovable "property to which Government shall be a party, or to any "certificates of sales granted by fiscals of land or other "immovable property sold under writs of execution."

By reg. 2 of the Land Sales Regulations, 1926: "Every "grant and every lease of land shall be under the signature "of the Governor and the Public Seal of the Colony . . . ."

1950. March 14, 15, 16, 20, 22 and 23. *Upjohn K.C.* and *Mocatta* for the appellant. There are two main questions, the first, a question of fact, whether the oral agreement alleged by the appellant was in fact made; the second, whether that oral agreement was valid and enforceable in law by virtue of the Prevention of Frauds Ordinance and the Land Sales Regulations, 1926. On the evidence, documentary and oral, the first question should be answered in the affirmative. On the second question, it is conceded that if the permit which was to be issued to the appellant is a lease he is out of court because of non-compliance with reg. 2 of the Land Sales Regulations. If, however, it is a licence, as it is submitted it plainly is, then those regulations have nothing to do with it. All that was put up for auction was the right to tap and take the produce of the rubber trees in certain lands. This is like a licence to enter into property and take minerals: it is nothing more than a licence to go on this land, and all that vests in the appellant is the latex when he takes it by tapping the trees.

The requisites for a lease are (i) exclusive possession given and (ii) it must be over a defined parcel of land. There is nothing in the auction sale advertisement and conditions which indicates that exclusive possession is to be given, and there is no defined area. Also the permit itself gives no right to possession of the trees, but only to the produce. The point is a short one of construction, and the permit cannot possibly be a lease within the meaning of the Land Sales Regulations. A permit or licence for produce was something plainly known to the responsible authorities in Ceylon: Ceylon Government Manual of Procedure, 1940, p. 9; Land Development Ordinance, c. 320 of the Legislative Enactments of Ceylon. The Land Commissioner has ample authority under the general administrative power conferred on him by ss. 3 and 4 of the last cited Ordinance to grant permits of this character, and he may delegate that power, and did in fact do so here.

The position in regard to the authority of the Government Agents themselves may be put in two ways: (i) that as the executive officers under the Land Commissioner they have under ss. 3 and 4 of the Land Development Ordinance a general authority, and, indeed, a duty, to issue permits in proper cases; (ii) quite apart from the general authority, they had in this case specific authority by letter from the Land Commissioner, which was a general delegation to carry out the following actions: the licence to Sabapathipillai was to be cancelled and the appellant was to be put in possession; that should be construed so as to give it business efficacy. The appellant was entitled to assume that the Assistant Government Agent was properly authorized by the Land Commissioner to carry through the transaction. There was a holding out within the meaning of the authorities. He is entitled to assume that when he receives a permit signed by the Assistant Government Agent it is a valid permit. For the nature of a licence compared with a lease see *Doe d. Hanley* v. *Wood* (1), and Halsbury's Laws of England (2nd ed.), vol. 20, p. 8, s. 5, which is adopted as part of the argument. The permit is not in any way framed as a lease, but in any case phraseology is not so important as the substance of the agreement. The permit is purely personal to the holder: he cannot assign it; and its terms show how very limited is the right given to him.

With regard to the use of the word " possession " and other words which tend to show that it is a lease, although words which are appropriate to apply to a lease may be used, if the court comes to the conclusion on the substance of the agreement that it is not a lease but a licence, the incautious use of words appropriate to a lease does not prevent its being a licence; and, of course, the converse is true: *Edwardes* v. *Barrington* (2). It is a matter of the construction of each agreement, and this one gave no right to exclusive possession; it was exactly what it was expressed to be a permit to go on the land and to take the latex. It is a licence and not a lease.

(1) (1819) 2 B. & Ald. 724, 737.

(2) (1901) 85 L. T. 650.

On the only other point, which arises under the Prevention of Frauds Ordinance, the trial judge held that the case fell within s. 2 but was taken out by s. 17. If the case falls within s. 2 at all, it can only be because it is a sale of immovable property, that is, the latex, the fruit of the rubber trees; and it is submitted that it is taken out of s. 2 by s. 17. That section is very wide, and "none" is a very strong word. The section means that where the Government is a party to a grant the provisions of s. 2 have not to be observed.

Sir David Maxwell Fyfe K.C. and *Gahan* for the respondent. There are four propositions. First, the Assistant Government Agent did not agree "to lease to the plaintiff the right to "tap and take the produce of the rubber trees . . . . and "to place the plaintiff in possession of the said allotments"—those words are taken from the plaint. That is an issue of fact. Secondly, the Assistant Government Agent had no actual authority from the Land Commissioner to make such an agreement while Sabapathipillai was in possession, and the appellant knew that the agent's authority was limited to his instructions to that effect from the Land Commissioner. If, therefore, the agent did make an agreement, it could not bind the Land Commissioner or the Crown. Fourthly, the alleged agreement constituted a lease. In that case, it is conceded, it was ultra vires the Land Commissioner. Lastly, if the agreement is not a lease, it was within s. 2 of the Prevention of Frauds Ordinance, and not within s. 17.

On the first point, the evidence, documentary and oral, establishes that the contract alleged by the appellant was not in fact made. As to the second proposition, if a person contracts with an agent and knows that the agent's authority is limited, then, to use the words of Lord Atkinson in *Russo-Chinese Bank* v *Li Yau Sam* (1), he does it at his peril, in this sense, that he must go on and see whether he has specific authority to make the contract. Here, the appellant knew that an order had been made, and it was for him to find out its contents—that there was no authority to issue a permit before possession had been taken on behalf of the Crown. [Reference was also made to *George Whitechurch, Ld.* v. *Cavanagh* (2), *Chaples* v. *Brunswick Permanent Building Society* (3), and *Kleinwort Sons & Co.* v. *Associated Automatic Machine Corporation, Ld.* (4).]

(1) [1910] A. C. 179, 184.
(2) [1902] A. C. 117, 125.
(3) (1881) 6 Q. B. D. 696, 712, 715.
(4) (1934) 50 T. L. R. 244, 245.

With regard to the third proposition—that the agreement constituted a lease—admittedly it is the substance that must be looked at. What the appellant says here is that there was an agreement to lease the right and to put him in possession of the allotment of land, and the breach alleged is the same. The weight of the argument for the appellant was that he was not given exclusive possession of specified land. But the agreement alleged is that he was to be put in possession, and if he is claiming possession it is difficult for him to argue that it does not give him possession at all. The limitations imposed by the conditions show that the purchaser would, apart from the conditions, have exclusive possession—it is exclusive occupation subject to the conditions which are imposed. On the last point, it is submitted that the contract alleged by the appellant is within the words "no promise, "bargain, contract or agreement . . . . for establishing any ". . . . interest, or incumbrance affecting land or other "immovable property," in s. 2 of the Prevention of Frauds Ordinance. The permit is an interest in land, and the Crown, while the permit was effective, could not sell the land free of incumbrance; the permit-holder's right would be an incumbrance. Section 17, by necessary implication, shows that the Ordinance applies to government dealings except to the extent to which s. 17 otherwise provides, and it provides that s. 2 shall not be taken as applying to a number of instruments. The difference between s. 2 and s. 17 is between transactions and written instruments. In the present case there was an oral agreement for the sale of immovable property, not a written instrument.

Upjohn K.C. in reply. It would be quite unsafe to overrule the finding of fact of the trial judge that the agreement alleged was entered into. The appellant was entitled to assume that the Assistant Government Agent was acting within his general authority when dealing with this matter: *Falmouth Boat Construction, Ld.* v. *Howell* (1); *Trickett* v. *Tomlinson* (2). As to whether the permit is a lease or a licence, it was said for the respondent that, apart from the conditions, the appellant would have exclusive possession. That is quite the wrong way of approaching the construction of a written document: the whole of it must be looked at to see what in fact the parties were going to do. But even supposing that that test is taken, and that the terms and conditions are ignored, still the appellant does not get exclusive possession. The fact that the word "possession" is used cannot turn something which is only consistent with permission into a lease. The whole intent and purpose of the document is to entitle the appellant merely to the amount of possession or occupation which is required for the purposes of the agreement; and as a matter of construction the permit is plainly a licence.

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(1) [1950] 2 K. B. 16.

(2) (1863) 13 C. B. (N. S.) 663.

Lastly, on the Prevention of Frauds Ordinance point, a mere licence to enter land does not confer or create an interest in land. The only reason the case falls within s. 2 at all is because it is a sale of immovable property. On what is the nature of a lease or licence see *Muskett* v. *Hill* (1). [Reference was also made to Maasdorp's Institutes of South African Law, vol. 2, p. 2.] The actual permit which constitutes the sale of the immovable property is by s. 17 taken outside of the operation of s. 2.

April 26. LORD SIMONDS delivered the judgment of their Lordships. This appeal, which is brought from a decree of the Supreme Court of Ceylon allowing the appeal of the Attorney-General of Ceylon from a decree of the District Judge of Colombo, raises difficult questions of fact and of law.

The primary question of fact is whether the appellant, a landed proprietor in Ceylon, on March 4, 1943, made an oral agreement with the Assistant Government Agent, Uva Province, one N. Chandrasoma, on behalf of the Crown, whereby it was agreed that in consideration of payments to the Crown at the rate of Rs. 6,000 per annum the appellant should have the right to tap and take the produce of the rubber trees on certain defined Crown lands in the Badulla District of Uva Province for a period of four years and two and a half months from March 15, 1943. The learned District Judge found as a fact that such an agreement was made, but in the Supreme Court a different view was taken, that court holding that, since the learned judge had not based his finding on the demeanour or reliability of the witnesses, it could properly come to a different conclusion on a consideration of the oral evidence and the relevant documents.

In this conflict of opinion on the facts their Lordships have given anxious consideration to all the circumstances of the case and have come to the conclusion that the Supreme Court was not justified in reversing the judgment of the learned judge, who had, in their view, ample material for forming the opinion to which he came, and, though he did not expressly measure the reliability of the appellant's and respondent's witnesses, cannot fail to have been influenced in his decision by the view that he took of them. Moreover, as their Lordships think, the relevant documents are on the whole more consistent with the appellant's story than with that of the respondent.

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(1) (1839) 5 Bing. N. C. 694, 706.

Before referring to the events of March 4, 1943, it is necessary to say something of the attendant circumstances. On January 23, 1942, the Land Commissioner had caused to be published in the Government Gazette a notification that the Government Agent of the Province of Uva would, on March 7, 1942, put up to auction "the lease of the right to "tap and take the produce of the rubber trees" on certain Crown lands of an area of about 278 acres, of which some 170 acres were in rubber, for a period of five years. The conditions of the auction provided (inter alia) that the purchaser should pay one-fifth of the rent immediately after the sale and the balance in four equal instalments. The appellant, who was a rubber planter of experience and the holder of leases of various other Crown lands, was the second highest bidder at the auction, the highest bidder being one Sabapathipillai with a bid of Rs. 44,000, who accordingly became the purchaser. He, however, for some time made default in the proper payments, and it was not until August 10, 1942, that a permit was issued to him in terms which, by reason of their importance on another issue, it is convenient here to set out in full. In the meantime, negotiations had been entered into with the appellant, and it appears that the Assistant Government Agent, Chandrasoma, had recommended to the Land Commissioner that the appellant should be offered the rights purchased by Sabapathipillai for Rs. 30,000 in the event of the latter's default, the large reduction in purchase price being no doubt due to the fact that on April 5, 1942, the first Japanese air raid on Ceylon had taken place.

The permit was, however, eventually issued to Sabapathipillai and was as follows: "Karuppannenpillai Sabapathipillai of "Lemastota Estate, Koslanda (hereinafter referred to as "'the permit-holder') is hereby permitted to take the produce "of the plantations on the parcel of Crown land called "'Atmagahinna *alias* Madugahainna, Wewelketiyahena, "'Keenaketiya Estate and Atmagahinna, Madugahahinna, "'Wewelketiyahena' (hereinafter referred to as 'the land')

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" situated in the villages of Kiriwanaga and Tittawelgolla " in the Chief Headman's Division of Wellawaya of the Badulla " District depicted as lots Nos. 127 and 136 in Final Village " Plan No. 318 Tittawelgolla, prepared by the Surveyor-" General and kept in his charge, and computed to contain " in extent two hundred and seventy-eight acres, two roods " and eleven perches, subject to the following conditions :—

" 1. This permit shall expire on the 31st day of May, 1947.

" 2. The annual rental shall be eight thousand eight hundred " rupees. The permit-holder shall pay the annual rental " on the 1st day of June in every year to the Government " Agent of the Uva Province (hereinafter called ' the Govern-" ' ment Agent ') at the Badulla Kachcheri.

" 3. This permit is personal to the permit-holder. The " permit-holder shall not in any manner whatsoever deal with " or otherwise dispose of his interest and rights under this " permit.

" 4. The permit-holder shall not erect any permanent " buildings or make any plantation on the land.

" 5. The permit-holder shall not fell or in any way damage " or allow to be felled or in any way damaged any rubber " trees or any other valuable timber trees growing on the land " except with the permission of the Government Agent " previously obtained in writing.

" 6. The permit-holder shall not dig or in any other way " whatsoever disturb the soil of the land, nor shall he clean " or weed the land.

" 7. Any breach of any of the conditions contained in this " permit shall render the permit liable to immediate cancellation " without compensation on the orders of the Government " Agent.

" 8. On the expiry or cancellation of the permit the permit-" holder shall deliver quiet possession of the land to any " person acting under the orders of the Government Agent, " and such person may on such expiry or cancellation, enter " upon the land and take possession thereof on behalf of the " Government Agent.

" 9. The permit-holder shall not have or make any claim " for compensation for improvements effected or expenses " incurred, or for damages, or for any other cause or reason " whatsoever.

" 10. The permit-holder shall not have any claim to "preferential sale or lease of the land by reason of his having "been granted this permit.

"Issued on the 10th day of August, 1942:

"Sgd. M. CHANDRASOMA,
"*Asst. Govt. Agent.*

"Accepted on the above conditions by the above mentioned "permit-holder.

"Sgd. K. SABAPATHIPILLAI."

It appears that Sabapathipillai continued to meet with difficulties in working his permit. On January 7, 1943, he requested the Land Commissioner for sanction to transfer it to another, and the appellant, seeing in this the opportunity to secure the permit for himself, asked Mr. Wijerathe, his advocate in Colombo, to interview the Land Commissioner on his behalf. This he did, and the result of it was that, in the words of Mr. Wijerathe, the Land Commissioner ordered that the appellant should be granted the lease of the rights in question on the basis of Rs. 30,000 for five years. What in fact the Land Commissioner did—and it is a matter of vital importance in the case—was to write a letter of January 28, 1943, to the Government Agent, Uva, whose name was Coomaraswamy, in the following terms:—

> "The conditions of the permit dated 10.8.42 [i.e. to "Sabapathipillai] have been flagrantly violated. You "should cancel the permit forthwith and take possession "of the land on behalf of the Crown. You may thereafter "issue a permit to Mr. H. E. Wijesuriya to take the produce "of the plantations on the land for the balance period of "5 years at the rental approved by my letter No. A/4161 "of 25.4.42."

The approved rental referred to the basis of Rs. 30,000 for five years. Their Lordships observe on this letter that its terms are unambiguous and that it contains no authority to issue a permit before taking possession of the land on behalf of the Crown.

It was thought desirable, in view of the fact that Sabapathipillai had entered into some private agreement with one Karunatileke, and the latter had entered on the land in question, to take the advice of the Attorney-General before proceeding further. On receipt of his advice that the permit could be cancelled, on March 2, 1943, Chandrasoma, the Assistant Government Agent, wrote to Sabapathipillai informing him that in terms of cl. 7 of the permit the lease granted to him was cancelled for breach of conditions 3 and 5, and that he was required to deliver peaceful possession of the land to the Divisional Revenue Officer, Wellawaya, on March 15, 1943, at 9.30 a.m. and vacate the land immediately thereafter. It is common ground between the parties that it was not expected that either Sabapathipillai or Karunatileke would make any trouble about complying with this notice; nor is it in dispute that it was contemplated that a permit should at some time be issued to the appellant. The question in dispute is whether on March 4, 1943, an agreement was made between the appellant and Chandrasoma in the terms alleged by the former. On this point the divergence of evidence is remarkable.

The appellant's evidence was to the effect that on that day he first went and saw the chief land clerk, whose name was Attanayaka, at the Government Office at Badulla; that the latter said that he had been asked by Chandrasoma to ascertain whether the appellant was willing to deposit Rs. 6,000, being the annual rent, in order that he might be given the lease; that the appellant then went into the office of Chandrasoma, who confirmed what Attanayaka had said, and the appellant then agreed the terms; that Chandrasoma then said that the appellant would be given the lease and would be put into possession on March 15; and that the appellant then returned to the Land Department and drew a cheque for Rs. 6,000, for which on the following day he received a receipt dated March 5, 1943, in these terms: "Received from "Mr. E. Wijesuriya the sum of Rupees six thousand only "and cents—being rent on Kemapitiya Rubber estate pending "issue of lease." The next that the appellant heard about the matter was the receipt by him of a letter dated March 6, 1943, from the Chena Surveyor stating that he had been instructed by the Government Agent, Uva, to put him in possession of the lands in question as soon as the present lessee vacated it on March 15. The Chena Surveyor had in fact been so instructed in a letter of March 4 on the terms of which the appellant relied.

A very different account of the events of March 4 was given by Chandrasoma and Attanayaka. The former denied that he had had any interview with the appellant on that day; the latter agreed that he had an interview, but differed from the appellant in asserting that he had told him that he would be put in possession of the land in the event of Sabapathipillai vacating it, and that the Rs. 6,000 would be placed on deposit and would be refunded to him if he was not put in possession of the land.

It appears to their Lordships that on this evidence, supplemented not only by the letter to the Chena Surveyor already mentioned but also by a contemporary minute clearly made before the interview between Attanayaka and the appellant (not, as the Supreme Court appears to have thought, after that interview), the learned District Judge could properly come to the conclusion of fact which was the basis of his decision and that the Supreme Court had no adequate ground for setting it aside. But, while their Lordships are so far in favour of the appellant, there are other considerations which are fatal to his appeal.

The respondent, in his answer to the plaint which alleged the agreement already stated, denied that agreement and raised certain other defences, but did not specifically plead that, if the agreement was in fact made by the Assistant Government Agent, it was made without authority. When, however, the issues came to be settled, the 7th issue was framed as follows: " If the [assistant] Government Agent " entered into the agreement pleaded in paragraph 3 of the " plaint, was he acting without authority? " It would have been open to the appellant to demand that on this issue he should be at liberty to plead that there was ostensible, if not actual, authority to enter into the agreement, and it would then have been for him to prove the facts on which he relied as a holding out of authority. This course was not taken, with the result that this part of the case was not presented with the particularity which such a plea, always a difficult one to establish, requires.

On the available material their Lordships have come to these conclusions:—First, they are of opinion that the Assistant Government Agent had in fact no authority to make the alleged agreement. The instructions given by the Land Commissioner in his letter of January 28, 1943, were clear and were inconsistent with either a permit being issued before the Crown resumed possession of the land or an unconditional agreement being made to grant a permit before that event. The Assistant Government Agent therefore acted in excess of (if not in defiance of) the instructions which he had received. Secondly, their Lordships see no sufficient evidence of ostensible authority. On the contrary, it became clear from numerous passages in the evidence, and particularly from

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the steps initially taken by the appellant in January, 1943, that he looked to the Land Commissioner himself for an order that, when Sabapathipillai vacated the land, he should enter in his place. He may have assumed that the instructions given by the Land Commissioner to his subordinates went further than they did, but, if his assumption was a wrong one, he acted at his peril: see *Russo-Chinese Bank* v. *Li Yau Sam* (1). Nor, apart from the incidents of this particular transaction, was there any sufficient evidence of a general holding out of the Assistant Government Agent as a person with authority to enter into an oral agreement to grant a lease of, or a permit to take the produce of, Crown rubber lands at a future date. Learned counsel for the appellant relied on the provisions of the Land Development Ordinance of Ceylon and referred to the Ceylon Government Manual of Procedure; but neither in these nor in any course of conduct of the Assistant Government Agent here concerned or of any other Assistant Government Agent could he find a clear assertion that to that officer had been delegated the duty of making such an agreement. Their Lordships are therefore of opinion that, assuming the agreement to have been made as alleged, it was unauthorized by the Crown, and that on this ground the action and appeal must fail.

Two other defences were raised in the action which must be mentioned. First, it was contended that the alleged agreement was contrary to the Land Sales Regulations and was void; and, secondly, that it was unenforceable in that it did not comply with the terms of the Prevention of Frauds Ordinance. It was common ground between the parties that the first point turned solely on the question whether the permit given to Sabapathipillai, which was the model of that agreed to be given to the appellant, was a "lease" or a "licence." If it was a lease, then it was of no effect, since reg. 2 of the Land Sales Regulations of 1926 provided that every grant and every lease of land should (with certain immaterial exceptions) be under the signature of the Governor and the Public Seal of the Colony. On this question the learned District Judge and the Supreme Court have come to different conclusions, the former holding the instrument to be a licence. the latter a lease. Both courts have based their conclusion on a consideration of the whole terms of the document.

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(1) [1910] A. C. 179, 184.

It appears to their Lordships that, while there are particular provisions which point in either direction, the decisive test is whether on its true construction the effect of the document is to give exclusive possession to the holder of the so-called permit; and, adopting this test, they are of opinion that all that is granted by the document is the right to tap and take the produce of the rubber trees within a defined area together with such rights of occupation or possession and other ancillary rights as are necessary to make the primary right effective. They find nothing in the document which would exclude the Crown or its officers from entering on, and making such use of, the land as might be thought fit, subject only to the limitation that in doing so they must not derogate from the rights granted to the grantee. In their Lordships' opinion, therefore, the so-called permit was not a lease but a licence. In expressing this opinion, they must observe that neither in the judgments under review nor in the arguments presented to the Board has it been suggested that the law of Ceylon on the question whether an instrument is a " lease " within the meaning of the Land Sale Regulations differs from the English law which would be applicable on a similar question.

The final question arose under the Prevention of Frauds Ordinance. It is convenient to set out ss. 2 and 17 of that Ordinance. They are as follows: " Section 2: No sale, " purchase, transfer, assignment or mortgage of land or " other immovable property, and no promise, bargain, con" tract or agreement for effecting any such object, or for " establishing any security, interest, or incumbrance affecting " land or other immovable property (other than a lease at " will, or for any period not exceeding one month) nor any " contract or agreement for the future sale or purchase of " any land or other immovable property shall be of force " or avail in law unless the same shall be in writing and signed " by the party making the same, or by some person lawfully " authorized by him or her in the presence of a licensed notary " public and two or more witnesses present at the same time, " and unless the execution of such writing, deed, or instrument " be duly attested by such notary and witnesses."

By s. 17: " None of the foregoing provisions in this " Ordinance shall be taken as applying to any grants, sales " or other conveyances of land or other immovable property " from or to Government, or to any mortgage of land or " other immovable property made to Government or to any

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"deed or instrument touching land or other immovable "property to which Government shall be a party, or to any "certificates of sales granted by fiscals of land or other "immovable property sold under writs of execution."

It is plain that the alleged oral agreement falls within s. 2, whether as an agreement for effecting the sale of immovable property or as an agreement for establishing an interest affecting land or other immovable property. If so, it would not be "of force or avail in law" unless it were saved by s. 17; for it was not in writing as prescribed by s. 2, and, necessarily, its execution was not notarially attested. Was it, then, saved by s. 17? In their Lordships' opinion it was not. It appears to them that, while s. 2 deals with transactions and enacts that they must be reduced to writing as therein prescribed, s. 17 deals with instruments, i.e., with transactions which have already been reduced to writing, and exempts certain classes of instruments from the necessity of notarial attestation. The language of the section, "grants, sales or "other conveyances" and "any deed or instrument touching "land, etc." points irresistibly to this conclusion. There is nothing, therefore, in the section which saves oral agreements for the sale of immovable property by Government from the necessity of being reduced to writing. Nor is there any reason to suppose that this is a casus omissus. The present case is sufficient to show how desirable it is that an agreement for the sale of immovable property should be in writing, even if one of the parties to the agreement is the Crown through one of its servants. On this ground also, therefore, the appeal must fail.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Solicitors: *William A. Crump & Son; Burchells.*

[HOUSE OF LORDS.]

H. L. (E.)*

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Feb. 15, 16, 20, 21; Apl. 27.

ASHER . . . . APPELLANT;

AND

SEAFORD COURT ESTATES LD. . . RESPONDENT.

Landlord and tenant—Rent restriction—Standard rent—Letting at higher rent—Burdens undertaken by landlords on grant of the new lease—"Transfer of burden"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3.

By a tenancy agreement entered into in 1935 a flat was let at a yearly rent of 175*l.*, which became the standard rent under the Rent Restriction Acts. The tenant thereby agreed to keep it in repair, but the landlords in fact repaired the exterior and, further, supplied hot water free of charge and arranged for the removal of the refuse, although there were no covenants in the agreement to provide these services. After the expiration of the tenancy the successors in title of the landlords, by a lease made in 1943, let the flat to another tenant at a yearly rent of 250*l.* They thereby covenanted to keep the exterior of the flat in repair, to arrange for the removal of refuse and to supply hot water.

Held (1.) that, as regarded the exterior repairs, there had been a transfer to the landlords of a "burden or liability previously "borne by the tenant" within the meaning of s. 2, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, so as to justify an increase of rent. Under the earlier agreement the "burden or liability" was none the less borne by the tenant, though the landlords in fact gratuitously performed his obligations.

(2.) (*Per* Lord Porter, Lord Normand and Lord Reid, Lord MacDermott dissenting) that, as regarded the supply of hot water and the disposal of refuse, there had been a transfer to the landlord of a "burden," though not of a "liability" (viz. legal obligation), since, under the earlier agreement, the practical necessity of providing those services rested on the tenant.

Per Lord Normand:—The ruling of Lord Goddard C.J. and Denning J. in *First National Housing Trust Ld.* v. *Chesterfield Rural District Council* [1948] 2 K. B. 351, 358, 359, that "burden" means a "contractual burden" must be disapproved.

It is immaterial whether or not the landlord has forgotten or is ignorant of the earlier letting: the rent is increased "in respect "of" the transfer of the burden within s. 2, sub-s. 3, where a greater burden or liability has been imposed on the landlord by the terms of a particular letting than was imposed on him by the terms of the letting under which the standard rent is ascertained.

**Present:* LORD PORTER, LORD NORMAND, LORD MACDERMOTT and LORD REID.

Winchester Court Ld. v. *Miller* [1944] K. B. 734 approved.
Decision of the Court of Appeal (sub nom. *Seaford Court Estates Ld.* v. *Asher*) [1949] 2 K. B. 481 affirmed.

APPEAL from the Court of Appeal (Lord Greene M.R., Asquith and Denning, L.JJ.).

The facts, stated by Lord Porter, were as follows:—This was an appeal from an order of the Court of Appeal dated June 1, 1949, setting aside a judgment of the learned county court judge in the Bloomsbury county court dated December 14, 1948, and remitting the action to him. The claim of the plaintiffs (the present respondents), the landlords, was for 62*l.* 10*s.* 0*d.*, being one quarter's rent for the quarter ending September 29, 1948, and in the county court judgment was given in favour of the defendant (the present appellant) who was the tenant of the premises in question, on the claim and for the sum of 68*l.* 15*s.* 0*d.* on a counterclaim for rent alleged to have been overpaid and to be recoverable under the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939.

The landlords were the owners of a block of flats known as Seaford Court, No. 222 Great Portland Street, W.1, in the County of London, and the defendant was the statutory tenant of Flat No. 2 in that block.

The flat was originally let by an agreement in writing of September 23, 1935, made between the landlords' predecessors in title and one William Griffith Edwards, for a period of three years from September 29, 1935, at a rent of 175*l.* payable in advance quarterly. Its terms, so far as they were relevant to the matter in dispute, were as follows: (1.) the then tenant agreed (*a*) to pay the rent and to pay for all electricity and gas supplied to the premises (cl. 1); (*b*) to keep the premises in proper and sufficient and complete tenantable and decorative repair and condition (fair wear and tear and damage by fire excepted) and at the expiration or determination of the tenancy to deliver up the premises to the landlords in such repair and condition as aforesaid (except as aforesaid) (cl. 2). (2.) The then landlords by cl. 14 agreed to pay "all rates and "taxes" in respect of the premises, except charges for electric light and gas. The tenant under that agreement held over after the expiry of the term of the lease until December, 1939, when he vacated the premises, and the flat was then vacant until September, 1943.

By a lease made dated September 29, 1943, the landlords let the flat to the tenant from September 1, 1943, for the term of five years and twenty-eight days at a rent of 250*l.* inclusive reducible to 175*l.* a year until three months after the cessation of hostilities between England and Germany, to be paid without any deduction (except for landlords' property tax) by equal quarterly payments in advance. (1.) Under this lease the tenant covenanted (*a*) by cl. 2 of the tenant's covenants to "keep the interior of the flat in good tenantable "repair and condition together with all fixtures and fittings "in and about the same" and to deliver up the same at the end or sooner determination of the term in such good tenantable repair and condition (fair wear and tear and damage by accidental fire excepted); (*b*) by cl. 3 to abide by and conform to the general regulations contained in the schedule, i.e., to provide bins for the removal of the ordinary refuse of the flat, and to deposit the bins on the lift not later than 9 a.m. every day (except Sunday). (2.) The landlords covenanted (*a*) by cl. 1 of the landlord's covenants during the said term to "pay all existing and future rates, taxes, charges, assess"ments, impositions and outgoings whatsoever" for the time being payable in respect of the flat; (*b*) by cl. 2 at all times during the said term to "keep the main walls and timbers "roof, drains, pipes and exterior of the said messuage and "premises and the staircase, hall, lifts, passages and such "other internal parts thereof as shall from time to time be "used by the landlords in common with the other tenants "of the landlords in good and substantial repair and in clean "and proper order and condition and properly lighted," and also to arrange for the removal of the ordinary domestic refuse of the flat in bins on every day except Sundays; (*c*) by cl. 3 as follows: "And also will provide and maintain "a proper supply of hot water for the use of the flat, but "the landlords shall not be liable to the tenant for any failure "in the supply of hot water that shall happen from any "cause not under their control."

It was common ground (i) that the rateable value of the flat was and remained at all material times 62*l.* a year; (ii) that the flat was a dwelling-house to which the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939, applied; (iii) that the standard rent of the flat was 175*l.* a year; (iv) that while Edwards occupied the flat the landlords or their predecessors in title repaired the exterior of the flat, supplied hot water free of charge, and provided the other amenities now undertaken by the landlords under the terms of the later lease ; (v) that the landlords either did not know of or had forgotten the existence of the lease of September 23, 1935, when they entered into the lease of September 29, 1943.

Heathcote-Williams K.C., *J. F. G. Stephenson* and *Corley* for the appellant (the tenant). There has been no transfer to the landlords of any burden or liability previously borne by the tenant. The landlords or their predecessors in title bore and have always borne every burden or liability imposed on them by the new lease. The landlords have only undertaken to do that which their predecessors in fact did during the currency of the previous letting, and accordingly no burden or liability is transferred to them. This applies alike to the doing of the outside repairs, the provision of hot water and the removal of refuse. The burden was one which the landlords' predecessors had previously undertaken voluntarily. The fact that the previous tenant never bore the burden because his landlords bore it shows that s. 2, sub-s. 3, of the Act of 1920 does not apply. The Rent Restriction Acts afford strict and well defined protection to the tenant, and, while a landlord can redistribute the burdens and advantages under the contract of tenancy, he cannot impose fresh terms. Thus, though it is an improvement for the landlords to undertake to supply hot water, it is not one for which, under the Act, they may increase the rent. There is no obscurity about the construction of s. 2, sub-s. 3, on which the landlords rely. Difficulties only arise from *Winchester Court Ld.* v. *Miller* (1), but that was a case of the transfer of a contractual burden and does not conclude the matter against the tenant here. What Scott L.J. said there (2) was contrary to the express words of the Act. The sub-section should be read strictly and literally, and should not be given a liberal construction. The express provisions of s. 2, sub-s. 5, cover this case : see also *Heydon's* case (3) and *Kent County Council* v. *Gerard* (*Lord*) (4).

But if the sub-section is to be construed liberally, the whole of it must be so construed and not just a part, and if " transfer " is to be read to cover a mere shifting, as distinct from a formal

(1) [1944] K. B. 734.
(2) Ibid. 742–3.
(3) (1584) 3 Co. Rep. 7 a.
(4) [1897] A. C. 633, 639.

transfer, "liability" should not be read as a strict legal liability. The landlords are not entitled to pick out one particular word for liberal construction. Here there cannot be said to be a transfer, because the landlords either had forgotten the earlier tenancy agreement or else had not heard of it. So the increase of rent was not "in respect of" the transfer of any burden to the landlords, since no regard was had to the fact that any fresh burdens were being undertaken.

There is no evidence that the increase was made in respect of anything at all. The purpose of the sub-section is to enable a tenant, when an increase is made, to know what his position is, but here there is nothing to show the valuation of the obligations and services relied on. It could have been shown, and this should have been done before the rent was raised. The material date is that of the beginning of the lease: see *Palser* v. *Grinling* (1). That is the day when a landlord must make it clear that the increase of rent is being made specifically in respect of certain matters, since the only increases in rent that can be made are those specifically provided for by the Act: see *Woodside House* (*Wimbledon*) *Ld.* v. *Hutchinson* (2).

As regards the outside repairs, their cost was not a de facto burden borne by the tenant during the old tenancy; nor was it de facto transferred to the landlords by the present lease; nor did the change in the terms result in a transfer of a burden, since there was no de facto burden to transfer. This was also true a fortiori of the supply of hot water. In respect of this service the earlier lease by its terms imposed no liability on the tenant, who could either provide it himself or go without.

Accordingly, although the present landlords undertook a fresh burden, it was not one transferred from the tenant. If a landlord, who is not under any liability to supply hot water, does so at his own cost and then stops the supply for a day, demanding an increased rent before renewing it, to which the tenant agrees, this may amount to a transfer of a burden. But if, before stopping the supply, he demands an increase of rent for its continuance and that is agreed to, there can be no transfer of a burden.

The burden, so far as the tenant was concerned, was a contingent practical burden, and there can be no transfer of a contingent burden, for the burden within s. 2, sub-s. 3, must

(1) [1948] A. C. 291.

(2) [1950] 1 K. B. 182.

be either a legal burden or an actual burden. The same considerations apply to the provision for the removal of refuse. [They referred to s. 1, s. 2, sub-ss. 2, 3 and 5, s. 3, sub-ss. 1 and 2, and s. 11 of the Act of 1920; s. 8, sub-s. 2 of the Act of 1923; s. 3, sub-s. 1, and s. 16, sub-s. 1, of the Act of 1933; and s. 3, sub-s. 1, of the Act of 1939; and to *Griffiths* v. *Davies* (1); *J. & F. Stone Lighting and Radio Ld.* v. *Levitt* (2); *Regional Properties Ld.* v. *Oxley* (3); *Property Holding Co. Ld.* v. *Clark* (4); *First National Housing Trust Ld.* v. *Chesterfield Rural District Council* (5) and *Winchester Court Ld.* v. *Miller* (6).]

C. L. Henderson K.C., *MacMillan* and *Michael Hoare* for the respondents (the landlords). In this case the claim is for the last quarter's rent under the lease, and at that time the tenant was not a statutory tenant, since he only became so when the lease ended. Till then the parties were free to contract. Under the Rent Acts freedom of contract remains save in so far as it is expressly limited: see Megarry on the Rent Acts (5th ed.), p. 115. Taking the Acts to apply, this is a case of a "transfer to a landlord of any burden or liability "previously borne by the tenant" within s. 2, sub-s. 3, of the Act of 1920, and the "result" is that the terms on which the dwelling-house is held are "not less favourable to the "tenant." In so far as the increase is "in respect of" the transfer, it is reasonable, and it is not deemed to be an increase of rent for the purposes of the Act. Under the old tenancy the then tenant was under a "burden or liability" as regarded the repairs (although the landlord in fact executed them) and was subject to a contingent "burden" as regarded the services (although the landlord in fact performed them). The word "burden" is apt to include what is reasonably necessary for the enjoyment of the flat. An actual and a potential burden are both burdens. Since during the first tenancy the then landlords were entitled to discontinue the repairs and the services, there was at all times a contingent burden on the then tenant, whereas under the new lease the landlords covenanted to undertake these matters. Before then the position was that the then tenant had no contractual right to a hot-water supply or to the removal of refuse. But in such a flat as this, and in such a neighbourhood as this, he was under a practical necessity of providing for them. The position would have been the same if the landlords had been accustomed to have the chimneys swept voluntarily without actually covenanting to do so. By reason of the practical necessity the contingent burden would have been on the tenant.

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(1) [1943] K. B. 618, 620.
(2) [1947] A. C. 209, 216.
(3) [1945] A. C. 347, 350, 354, 355, 357, 358.
(4) [1948] 1 K. B. 630, 648, 650.
(5) [1948] 2 K. B. 351.
(6) [1944] K. B. 734, 740.

The removal of refuse can only come within the sub-section if the supply of hot water is within it. As regards the repairs, under the old tenancy the then tenant was liable in law; under the new tenancy the landlords are liable under contract. The sub-section must be construed liberally, and under s. 2, sub-s. 3, there is no requirement that a landlord shall give notice of the fact that a burden is being transferred; but if a wrong figure is put on the value of the transfer the injured party can go to the court: see also the proviso to s. 2, sub-s. 3.

Asquith L.J. was right in the four propositions which he laid down in this case in the Court of Appeal (1). See also his observations on the phrase " in respect of " (2). *Winchester Court Ld.* v. *Miller* (3) was rightly decided on the ground on which it was decided, although it could have been decided as well under s. 2, sub-s. 5. The ratio decidendi is to be found in the judgment of Scott L.J. (4), but it makes no difference to the reasoning of the court on which ground the case was decided. [They referred to *Oxley* v. *Regional Properties Ld.* (5); *Regional Properties Ld.* v. *Oxley* (6); *Engvall* v. *Ideal Flats Ld.* (7); *Property Holding Co. Ld.* v. *Clark* (8); *First National Housing Trust Ld.* v. *Chesterfield Rural District Council* (9); *Morgan* v. *Liverpool Corporation* (10), *McCarrick* v. *Liverpool Corporation* (11); and s. 15, sub-s. 1, of the Act of 1920.]

Heathcote-Williams K.C. in reply. Since in law the liability for rates is always on the tenant as occupier, the proviso to s. 2, sub-s. 3, does not help the landlords as regards transfer. There is nothing in the sub-section to suggest that it should be construed liberally. As for the meaning of " burden," it must indicate something actually borne: c.f. " Bear ye " one another's burdens ": Gal. VI, 2. It is a question of fact to be decided in each case (*a*) to whom any particular burden belongs, and (*b*) by whom it is actually borne. As for liability for the removal of refuse, see the Public Health (London) Act, 1936, ss. 87 and 88. As for *First National Housing Trust Ld.* v. *Chesterfied Rural District Council* (1), see the appellants' argument and the judgment of Lord Goddard C.J.

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(1) [1949] 2 K. B. 481, 490.
(2) Ibid. 496.
(3) [1944] K. B. 734.
(4) Ibid. 742-3.
(5) (1944) 171 L. T. 129, 130.
(6) [1945] A. C. 347, 348, 350, 353, 355, 357, 359.
(7) [1945] K. B. 205.
(8) [1948] 1 K. B. 630, 650.
(9) [1948] 2 K. B. 351, 358.
(10) [1927] 2 K. B. 131.
(11) [1947] A. C. 219.

Their Lordships took time for consideration.

April 27. LORD PORTER. My Lords, from the facts it is apparent that the rent has been increased from the standard figure of 175*l.* to 250*l.* a year, and the question for your Lordships' decision is whether the landlords were entitled to exact this or some other increase provided it leaves the terms on which the flat is held not less favourable to the tenant than the previous terms. The question is governed by the provisions of s. 2, sub-s. 3, of the Act of 1920: " Any transfer " to a tenant of any burden or liability previously borne " by the landlord shall, for the purposes of this Act, be treated " as an alteration of rent, and where, as the result of such a " transfer, the terms on which a dwelling-house is held are " on the whole less favourable to the tenant than the previous " terms, the rent shall be deemed to be increased whether " or not the sum periodically payable by way of rent is " increased, and any increase of rent in respect of any transfer " to a landlord of any burden or liability previously borne " by the tenant where, as the result of such transfer, the terms " on which any dwelling house is held are on the whole not " less favourable to the tenant than the previous terms shall " be deemed not to be an increase of rent for the purposes of " this Act: Provided that, for the purposes of this section, " the rent shall not be deemed to be increased where the " liability for rates is transferred from the landlord to the " tenant, if a corresponding reduction is made in the rent."

The county court judge held that the landlords were not entitled to make the increased demand or indeed any increase. The Court of Appeal reversed this decision and sent the case back in order that it might be determined what if any increase was justified.

The provisions of s. 2, sub-s. 3, of the Act of 1920 are plainly intended to keep the balance even between landlord and tenant.

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(1) [1948] 2 K. B. 351, 355, 357.

On the one hand, the landlord cannot increase the rent beyond the standard rent. If, however, that were the only limitation of his powers which the Act imposed, he might increase the burden upon the tenant by stipulating for terms more onerous than had been agreed in the tenancy by which the standard rent is calculated, provided he did not increase the rent. The earlier provisions of the sub-section are inserted to meet this danger. On the other hand, if the landlord and the original or any future tenant agree that the landlord should undertake liabilities greater than those imposed by the former tenancy, the Act provides that the landlord shall be entitled to recoup himself for the additional amenities granted to the tenant by charging a higher rent without being deemed to increase it. If this statement of the purpose of s. 2, sub-s. 3, of the Act is correct, as I think it is, it appears that a comparison must be made between the letting under which the standard rent is fixed and the letting which adds to or diminishes the rent to the tenant. The Court of Appeal so decided in *Winchester Court Ld.* v. *Miller* (1), and in my view were right in so deciding. The question therefore for your Lordships' determination in this case is whether the admitted increase of rent has been made in respect of a transfer to the landlords of any burden or liability previously borne by the tenant.

If the terms of the two lettings are alone to be looked at, the landlord has manifestly undertaken certain liabilities or burdens for which he was not responsible under the earlier lease. Under that lease the tenant had been liable to keep the premises in proper and sufficient and complete tenantable and decorative repair, and to pay for all electricity and gas. Under the later lease the landlords became liable for the payment of the charges for electricity and gas, to do all external repairs and to supply hot water. Some additional liability seems also to have been imposed upon the landlord with regard to the removal of refuse and the cleaning and lighting of the portion of the premises used by the tenants of the flats in common. Nevertheless it is said on behalf of the tenant that though certain additional liabilities have been placed upon the landlord yet they have not been transferred from the tenant, nor were they previously borne by him or his predecessor.

So far as the two main problems are concerned, namely the outside repairs and provision of hot water, it is said on behalf of the tenant that the landlord in fact previously undertook these tasks and therefore they were not previously borne by the tenant. If the only question was what in fact had been done, there would be truth in this contention, but in my view the question is not who in fact executed the work, but who was liable to do it, even though someone else actually performed it. Under the earlier lease the tenant was liable at least for the outside repairs of his own flat. Although the landlord may in the past have fulfilled that obligation, it has to be borne in mind that at any moment he might have called on the tenant to perform his contractual duty ; and it follows that the liability was always on the tenant, though its performance was never in fact demanded. In these circumstances the burden was throughout *his* burden, and in my opinion previously borne by him ; and so borne none the less though the landlord gratuitously performed it and had not insisted on the tenant carrying out his contractual obligations.

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(1) [1944] K. B. 734.

To my mind it stands very much in the same position as the right of a landlord, who has been charging a statutory tenant less than the standard rent, to increase it at any time and thereafter to recover the standard rent in full. The rights of the parties are not altered by a gratuitous forbearance on the part of the landlord.

With regard to the hot water, however, the tenant has a further argument. Under the earlier lease the landlord, it is true, was under no liability to provide hot water, whereas under the new tenancy that provision is imposed on him ; but it is maintained on the part of the tenant that no liability or burden was imposed on the tenant by either lease in this respect. A tenant, it is said, might under the earlier letting have provided hot water for himself or, if he wished, have done without it. No doubt the landlord had undertaken a fresh burden, but that burden had not been transferred from the tenant or previously borne by him.

If the section has reference only to legal obligations, the argument presented on behalf of the tenant is a formidable one, but I suggest to your Lordships that the Court of Appeal were right in thinking that it was not so confined. In truth and in fact in the case of premises of the character of those now under discussion a tenant would normally and naturally supply hot water himself if it were not supplied to him by his landlord. Indeed the very fact that it is stipulated for in the lease is an indication of its practical requirement. Under the earlier tenancy, as the learned county court judge has determined, there was no obligation on the landlord to provide hot water ; now he is obliged to do so. I agree with the Court of Appeal in thinking that this is not accurately described as a transfer of a liability. Liability, in my opinion, has reference to legal obligations and legal obligations only, but the word " burden " has been super-added to " liability ", and, as I think, embraces a wider meaning. The practical necessity of providing hot water in my view was a burden which the tenant had to bear under the old lease ; and under the new his burden has been transferred to the landlord. Such an interpretation of the section to my mind follows both the wording and the intention of the Act. It enables the landlord to add something to the standard rent without that addition being deemed to be an increase, just as the tenant on his part would be entitled to have the amount of his rent reduced if the landlord, after contracting under an earlier lease to supply hot water, were to be freed from that obligation by a later one. In such a case it could not, I think, be said that a fresh burden had not been imposed on the tenant because it was his choice whether he would supply himself with hot water or be content to do without it.

One further argument was presented on behalf of the tenant. It was said that, as the landlord had forgotten or was ignorant of the earlier lease, the increase of rent was not made in respect of the transfer of any burden to the landlord but was so made without consideration of the fact that any fresh burdens had been undertaken by him. I do not think that this argument can prevail ; in my view the question is not what the landlord knew or intended, but what he was justified in doing by the terms of the Act. The rent, in my opinion, is increased by the landlord " in respect of " the transfer of a burden or liability where a greater burden or liability has been imposed on the landlord by the terms of a particular letting than was imposed on him by the terms of the letting under which the standard rent is ascertained. It is that change by which the increase of rent is justified and in respect of which it is rightly made.

For these reasons I think that the Court of Appeal were right in determining to send back the case for reconsideration by the learned county court judge. In so deciding I do not attempt to determine what increase of rent is justified by

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the additional liabilities and burdens undertaken by the landlord: that is a question of fact which must be determined in the county court, presumably by a reference before the registrar. When that reference is held it will be for the court to determine what the monetary value is of the additional obligations of the landlord in respect of (1.) repairs, (2.) amenities, and (3.) hot water. So far as your Lordships are concerned, I suggest that the proper order is that, with these expressions of opinion in view, the appeal be dismissed with costs and the action be remitted to the county court judge.

LORD NORMAND. My Lords, I agree with the opinion of my noble and learned friend on the woolsack, and I shall say no more on any of the questions debated except that related to the supply of hot water to the appellant's flat. No recapitulation of the facts need be attempted, but, in order that the limits of the issue should be defined, I would remind your Lordships that the appellant accepted without reserve the finding of the learned county court judge that there was under the old lease of September 23, 1935, no contractual obligation binding the then landlord to supply hot water to the then tenant's flat, and that it was not argued that the rent paid by the tenant under that lease covered a charge for the supply of the hot water.

The issue turns upon s. 2, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which has been read to your Lordships. Asquith L.J. has stated the general effect of the sub-section in four propositions which were not challenged by either party and which are in my respectful opinion accurate. He says (1): "Now in order "to bring the increase of rent within the relevant part of "the sub-section so that it can be 'deemed' not to be an "unpermitted increase, the landlords must establish four "propositions: (i) that 'the terms on which the dwelling-"'house is held,' though changed, 'are not less favourable "'to the tenant' than they were before the increase of rent; "(ii) that the change in the terms is the 'result' of 'a transfer "'to the landlord of a burden or liability'; (iii) that this "'burden or liability' was before the transfer 'borne by the "'tenant'; (iv) that the increase in the rent is an increase "'in respect of the transfer' in question."

(1) [1949] 2 K. B. 481, 490.

The word " terms " gave rise to some discussion. I think that it means the legal rights and obligations of parties as determined by the provisions of the contract or by law. Among the terms is, I think, the rent. What the courts have to do is to weigh the whole terms of the old lease of September 23, 1935, against the whole terms of the new lease of September 29, 1943. No increase of rent can be recovered unless on balance the terms of the new lease " are not less " favourable to the tenant " than the terms of the old lease. But the effect is not that, if the landlord has undertaken in the new lease a burden or liability borne by the tenant under the old lease, but has added too much to the rent in respect of the transferred burden or liability, he cannot recover any increase of rent : he can recover so much of the increase as represents the annual value of the transferred burden or liability.

There are two stages in this procedure : first the stage now reached, where it has to be determined whether, apart from the rent, the conditions for some increase of rent are apparently satisfied ; and second the stage where it has to be determined whether the increase of rent or any part of the increase is a fair assessment of the annual value of the transferred burden or liability. If the increase is too large, the landlord cannot recover the excess, but he can recover the rest. So at this stage the rent in each lease can for the purpose of the comparison be ignored, and if the landlord establishes that on a comparison of the terms of the two leases (excluding the rents) the present lease is not less favourable to the appellant than was the lease of 1935 to the then tenant, and if he also establishes the other three propositions enunciated by Asquith L.J., the case must go back to the county court, which will then have the duty of valuing the transferred burden or liability and of determining whether the whole or what part, if any, of the increase of rent is unpermitted. In the present instance it is plain that the terms of the present lease (apart from the rent) are not less favourable to the appellant than were the terms of the lease of 1935 (apart from the rent) to the then tenant, for no additional liability or burden except the increase of rent has been placed on the shoulders of the appellant. The real question is whether the respondent has established the remaining three propositions to which I now turn.

It is certain that the respondent has assumed under the new lease a legal liability to provide hot water which did not rest on the landlord under the old lease. It is also certain that there was no legal liability on the tenant under the old lease to provide himself with hot water. There was therefore no transfer to the landlord of a legal liability which was before the transfer borne by the tenant. But that does not end the matter. For though I think that the word " liability " in the sub-section means " legal liability," I also think that the word " burden " is not pleonastic, and that it has a looser meaning and a wider denotation than " liability." A liability is a burden but a burden is not necessarily a liability.

But as soon as one departs from strictly legal rights and obligations, it becomes difficult to define what " burden " connotes. To say that it must include some de facto inconvenience or disadvantage as well as legal liabilities is true but inadequate. The Court of Appeal has held that " burden " may include " a thing which the tenant as such reasonably " desires to have provided for his benefit for the provision " of which he has no legal right of recourse against anyone " else " (Lord Greene M.R. (1)) : or " the practical necessity " . . . . of providing the service himself " (Asquith L.J. (2)) ; or the burden " as a matter of practice " of providing something for himself (Denning L.J. (3)). I do not reject any of these paraphrases of " burden," but I would with respect qualify them. There is a difference between what may be called the amenities which go with different dwelling-houses. This was a flat equipped for the supply of hot water. No landlord in 1935 could expect to find a tenant willing to occupy such a flat without the use of hot water, and the supply of hot water was a practical necessity. The landlord had control of the furnace, and it was necessarily he who must fuel and stoke it and carry out the required service. The only practical question was whether the landlord or the tenant was to pay for this. It is the cost of supplying the hot water which was the " burden," because it was a cost which both the landlord and the tenant of such a flat must have contemplated would as a matter of practical necessity be incurred. But the landlord in fact bore this cost during the currency of the old lease, and therefore, it is said, it was not de facto a burden borne by the tenant under the old lease, nor was it de facto transferred to the landlord under the current lease, nor did the change

(1) [1949] 2 K. B. 481, 487.
(2) Ibid. 492–3.
(3) Ibid. 498.

in the terms result from a de facto transfer of burden, since there was no de facto burden to transfer.

This argument fails to satisfy me. The cost of supplying hot water was under the old lease a burden which lay on the tenant and was borne by him because he could call on no one else to bear it. The fact that the landlord bore it for him did not make it any the less the tenant's burden. On any day the landlord by his own volition could have ceased from heating the water unless the tenant agreed to pay the cost. I therefore demur to the description of the burden as a contingent burden, which describes, or at any rate suggests, a burden dependent on a casual event. The burden existed as a tenant's burden throughout the period when the landlord was in fact supplying the hot water, and it was not merely a burden which would have come into existence if the landlord had stopped the supply. Mr. Heathcote-Williams said that if a landlord, not being under liability to supply hot water, does so at his own cost and then stops the supply for a day and insists on an increase of rent before renewing it and the tenant agrees, there might be a transfer of a burden ; but that if the landlord before stopping the supply demands an increase of rent for the continuance of the supply and the tenant agrees, there is no transfer of the burden. That is the logical consequence of treating the burden as a burden arising only on the occurrence of a contingency, but it appears to me to result in a reductio ad absurdum. I would prefer to express no opinion about a burden contingent on the occurrence of a casual event, as in a case in which the landlord agrees to pay the cost of supplying hot water until the price of coal reaches a certain figure and in a subsequent lease agrees to supply hot water unconditionally. In such a case the substitution at the date of the new lease of a more economical system of heating than by coal, or even a continuous downward trend of the price of coal from the date of the old lease, might or might not be relevant to the question whether there was a transfer of burden. No question of that sort arises here, and it is enough to say that a practically necessary service of the kind I have tried to describe, which the tenant cannot compel the landlord to bear, is still the tenant's burden, though the landlord or a third party ex voluntate bears it for him. That burden was transferred to the landlord by the current lease, and the change in the terms on which the flat is held is the result of the transfer of that burden.

It remains to ask whether the increase of rent is "in respect "of" the transfer. The appellant's contention is that, since the parties were at the time when they entered into the new lease unaware of the terms of the old lease, the words "in "respect of" are not satisfied. To this contention I respectfully adopt the answer of Asquith L.J., which is to my mind conclusive.

The conclusion that each of the four propositions laid down by Asquith L.J. has been satisfied seems to me in accordance with good sense, and to preserve that equilibrium which Scott L.J., in a case to be mentioned presently, held was the purpose of the sub-section. The appellant's argument would have the inequitable result that a statutory tenant in the like position with the appellant's would pay no more than the rent due under the old lease and yet he would be entitled to hold the landlord to his obligation to supply the hot water. This is the effect of s. 15, sub-s. 1, of the Act of 1920 where the words "original contract of tenancy" refer to the contract by which the statutory tenant was holding before he became a statutory tenant, as was held by Lord Greene M.R. in *Oxley* v. *Regional Properties Ld.* (1). This construction was accepted when that case came before this House on appeal: *Regional Properties Ld.* v. *Oxley* (2). Consistently with this construction, the Court of Appeal decided that, when a tenancy agreement provides that the landlord shall supply hot water to the tenant of a flat, the tenant on becoming a statutory tenant is entitled to the benefit of the obligation: *Engvall* v. *Ideal Flats Ld.* (3).

The view which I have formed is, I think, supported by *Winchester Court Ld.* v. *Miller* (4) and is at least not inconsistent with *Property Holding Co. Ld.* v. *Clark* (5). In *Winchester Court Ld.* v. *Miller* (4) the terms of the first lease included a full repairing covenant by the tenant; the terms of the contrasting and later lease included a tenant's undertaking to do repairs, fair wear and tear excepted. The Court of Appeal held that, though there was no undertaking by the landlord in the later lease to carry out fair wear and tear repairs, there was nevertheless a transfer of a burden from tenant to landlord, for if a tenant ceases to be liable for repairs the property will lose value unless the landlord does the repairs.

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(1) 171 L. T. 129, 130.
(2) [1945] A. C. 347.
(3) [1945] K. B. 205.
(4) [1944] K. B. 734.
(5) [1948] 1 K. B. 630.

Scott L.J. said (1): " I think the sub-section creates certain " rights for redressing an unfair alteration of the equilibrium " which underlies the legislative perpetuation of the standard " rent. The language of the sub-section is pointedly free " from limiting restrictions: '*Any* transfer to a tenant of " *any* burden or liability' shall be treated as an alteration of " rent and the increase of burden is treated as a forbidden " increase of the standard rent and made recoverable from " the landlord. So on the other hand, an increase of rent to " counterbalance a transfer of burden from the tenant to the " landlord is made recoverable from the tenant. The language " of the sub-section which contains this statutory recognition " of the fundamental principle of equilibrium ought, in my " opinion, to be liberally construed so as to give effect to that " principle, if its words permit that construction, and I think " they do. For these reasons I would construe the word " 'transfer' as a synonym for 'shifting' because the emphasis " of the section is on the fact of a change in the equilibrium. " It is the shifting of the burden that matters, not how or " by whom it is brought about."

It was said by Mr. Heathcote-Williams that there was no need in that case to apply a liberal construction of s. 2, sub-s. 3, because the express provisions of sub-s. 5 properly understood fitted the case and made the argument for a liberal construction unnecessary. I think that the argument for the preservation of equilibrium between the landlord and the tenant by a reasonable construction of s. 2, sub-s. 3, is none the less cogent, and that it justifies a liberal construction of " burden " as well as of " transfer." The proper limits of construction are not exceeded, where the words are ambiguous, by giving them a meaning, if they are capable of bearing it, which, without creating the mischief of a new injustice, effects the intent of the statute as gathered from the other provisions and from the mischief which they purport to remedy. On this principle it is legitimate to construe " burden " and " transfer " so as to preserve the " equilibrium " which Scott L.J. has described as the fundamental principle of the enactment.

In *Property Holding Co. Ld.* v. *Clark* (2), the question whether a burden had been transferred arose under the first branch of s. 2, sub-s. 3. I find no inconsistency between it and

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(1) [1944] K. B. 734, 742–3.

(2) [1948] 1 K. B. 630.

Winchester Court Ld. v. *Miller* (1). Scott L.J. was a party to the decision and made no comment on *Winchester Court Ld.* v. *Miller* (1), though it was cited. It is referred to only by Evershed L.J. (2), and he cites it for the proposition that the words of the sub-section are to be generously construed. It is unnecessary to enter into the details of the case, and all that need be said is that it is impossible to suppose that it was intended to question either the decision or the reasoning of Scott L.J. in *Winchester Court Ld.* v. *Miller* (1). The two cases have been reconciled by Asquith L.J. in the present case and he was himself a party to the decision of *Property Holding Co. Ld.* v. *Clark* (2).

In *First National Housing Trust Ld.* v. *Chesterfield Rural District Council* (3), the owner of a house appealed against a notice served on him by the local authority under s. 75, sub-s. 1, of the Public Health Act, 1936, requiring him to provide for a house let by him a covered dustbin of a certain size, weight and construction. The court of summary jurisdiction held that the requirement was unreasonable, and allowed the appeal. An appeal was then taken to the Divisional Court, where it was argued for the local authority that the decision of the court of summary jurisdiction contravened s. 2, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by transferring to the tenant a burden previously borne by the landlord. Lord Goddard C.J. held that that was not so, because " burden " in the sub-section meant a contractual burden. Denning J. agreed, and said (4): " In my opinion the words ' burden or liability ' " in s. 3, sub-s. 2 . . . . refer to a burden or liability imposed " by a term of the contract between landlord and tenant " or by a term imported by statute such as that contained " in sub-s. 5 of the same section. They do not refer at all " to, or affect, the landlord's power to discontinue a privilege, " facility or benefit which the tenant has previously enjoyed, " so long as it is not a part of the terms on which the tenant " holds the premises." These observations are contradictory of the construction of " burden " by the Court of Appeal in this case. Neither *Winchester Court Ld.* v. *Miller* (1), nor *Property Holding Co. Ld.* v. *Clark* (2) were cited. In my opinion the observations of Lord Goddard C.J. and Denning J.

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(1) [1944] K. B. 734.
(2) [1948] 1 K. B. 630, 650.
(3) [1948] 2 K. B. 351.
(4) Ibid. 359.

should be disapproved. It is not a necessary consequence that *First National Housing Trust Ld.* v. *Chesterfield Rural District Council* (1) should be held to have been wrongly decided, for there was an alternative ground of judgment that the court of summary jurisdiction had not placed any burden on the tenant because in fact it had not decided that the tenant must bear the expense of providing the bin.

I think that this appeal must be dismissed, subject to a modification of the order of the Court of Appeal so that the county court judge may clearly understand what matters he is directed to consider.

LORD MACDERMOTT. My Lords, the second limb of s. 2, sub-s. 3, of the Act of 1920 provides as follows: "and any "increase of rent in respect of any transfer to a landlord "of any burden or liability previously borne by the tenant "where, as the result of such transfer, the terms on which "any dwelling-house is held are on the whole not less favourable "to the tenant than the previous terms, shall be deemed "not to be an increase of rent for the purposes of this Act."

In this sub-section, I think, the words "in respect of" must be read as equivalent to "attributable to," and not as signifying that the landlord has consciously related the increase of rent, or some part of it, to the assumption by him of a specific burden or liability. To hold otherwise would, in effect, be to restrict the operation of the sub-section to cases where the landlord is aware of the terms of the tenancy with reference to which the standard rent is fixed, and I cannot read the sub-section as thus limited. As Asquith L.J. observes (2): "'in respect of' is a very comprehensive expression," and I do not think that this construction does violence to the language of the enactment.

As for the word "transfer," I agree with the view expressed by Scott L.J. in *Winchester Court Ld.* v. *Miller* (3), when he says: "I would construe the word 'transfer' as a synonym "for 'shifting' because the emphasis of the section is on the "fact of a change in the equilibrium. It is the shifting of "the burden that matters, not how or by whom it is brought "about."

The expression "burden or liability," as used in the sub-section, is apt to embrace more than the word "liability."

(1) [1948] 2 K. B. 351.

(2) [1949] 2 K. B. 481, 496.

(3) [1944] K. B. 734, 743.

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It must, I think, connote a legal liability, an obligation enforceable by someone other than the person subject to it. " Burden," on the other hand, is a word of broader meaning, capable indeed of describing various liabilities, but extending beyond this to include what has to be done or provided voluntarily by the landlord or tenant himself for the reasonable protection or enjoyment of his interest in the premises. There is, however, one qualification of this meaning of " burden " which in my opinion the context necessitates. The word " terms " in the sub-section must, I think, mean—as in s. 15, sub-s. 1—the terms of the contract of tenancy, either express or implied. But if a burden which never becomes a liability shifts from tenant to landlord, or from landlord to tenant, the terms of the tenancies which fall to be compared will not be affected " as the result of such transfer " and the sub-section will not apply thereto. It therefore seems that a " burden " within the sub-section must be one which in the course of transfer either starts or ends as a liability. This is not to say that " burden " and " liability " come to the same thing for the purposes of this enactment. For example : if the tenant of the first tenancy supplies his own hot water, there being no duty on either him or his landlord to do so, and the landlord of the second tenancy covenants to perform this service, then, as I understand the sub-section, there has been the transfer of a burden but not of a liability.

These considerations suffice to dispose of the appeal in so far as it relates to the repair or maintenance of the flat. By cl. 2 of the lease of 1935 the tenant agreed to keep the demised premises " in proper sufficient and complete tenantable " and decorative repair and condition." By the lease of 1943 the appellant, as tenant, agreed to keep the *interior* of the premises " in good tenantable repair and condition " together with all fixtures and fittings in or about the same " and the respondents, as landlords, agreed to keep " the main " walls and timbers roof drains pipes and exterior of the " said message and premises . . . . in good and substantial " repair . . . ." This last covenant relates to the building of which the flat in question forms a part ; but it seems necessarily to place upon the landlords a liability in respect of the external or structural maintenance of the demised premises which under the earlier lease was upon the tenant. Was this, then, a " liability previously borne by the tenant " if, as would appear to be the fact, the previous tenant did not do these repairs? I think it was, as, in speaking of a liability in respect of a past period, the person who was subject to it may well be said to have borne it irrespective of whether he had to do or pay anything because of it. There has thus been a transfer within the meaning of the sub-section to the respondents of a certain liability in respect of repairs. The county court judge will have to put a value on this and determine how much of the excess of 75*l.* over the standard rent may fairly be attributed to it.

By cl. 14 of the lease of 1935 the then landlords agreed to pay "all rates and taxes" in respect of the demised premises except charges for electric light and gas. By their first covenant in the lease of 1943 the respondents, as landlords, agreed to pay, in respect of the same premises "all existing "and future rates taxes charges assessments impositions "and outgoings whatsoever." In terms this is a wider obligation, but there is nothing in the case to show what charges, assessments, impositions and outgoings other than "rates and taxes" the tenant was in law liable to pay during the period of the earlier lease. If he was under any liability in this respect, then there has been a transfer of that liability within the meaning of the sub-section, and the county court judge will have to determine how much of the excess of 75*l.* ought to be attributed thereto. But an increase of rent cannot be justified under the sub-section by mere verbiage, and I think the first step for the county court judge to take in regard to this item will be to ascertain whether any liability of this nature previously rested upon the tenant.

The matters remaining for consideration relate to the respondents' obligations under the lease of 1943 to provide (*a*) for a supply of hot water, and (*b*) for the removal of refuse. I need not refer in any detail to the latter. The facts regarding it are extremely scant, and Mr. Henderson, for the respondents, conceded that he could not bring (*b*) within the sub-section unless he was entitled to apply it to (*a*).

The facts relating to the provision of a supply of hot water for the demised premises are as follows. During the earlier tenancy the landlords supplied the flat with hot water. The lease of 1935 makes no mention of this service and the county court judge has found that the landlords were under no contractual liability regarding it. Then, as now, the flat was let as a private residence, and I think it must be assumed that this service was of value to the tenant. In the lease of 1943 the respondents, as landlords, covenanted in these terms: "and also will provide and maintain a proper supply "of hot water for the use of the flat but the landlords shall "not be liable to the tenant for any failure in the supply "of hot water that shall happen from any cause not under "their control." The respondents have thus assumed an obligation which rested on neither of the parties to the earlier lease. There has not, therefore, been any transfer of a liability; and the question which arises and must now be determined is whether there has been a transfer of a burden within the meaning of the sub-section.

Had the tenant himself supplied this service during the earlier tenancy, I think the sub-section would undoubtedly apply if the views I have already expressed regarding its construction are correct. In such case a burden previously borne by the tenant would have shifted from him so as to fall on the landlord as a liability and make the terms of the respective tenancies different in a material respect. And in my opinion the same result would follow if the tenant, being left to perform the service for himself, had chosen to do without it; for in the case of a burden which is not a liability and which connotes what a tenant would need to do for the reasonable enjoyment of his premises, I think the words "any burden . . . . previously borne by the tenant" must be applied on an assumption of normal habit, otherwise the eccentric who, for example, prefers cold water for all domestic purposes, might gain a privileged position under the sub-section for himself and his successors by reason only of his eccentricity.

But these considerations do not touch the present position. The problem here is whether the words just quoted can be said to apply where the landlord, and not the tenant, has in fact previously borne the day-to-day burden of performing the service in question. The difficulty, as I see it, lies not so much in what the word "burden" may import when regarded alone, as in the scope to be ascribed to the crucial phrase in which it occurs and, in particular, the degree of significance to be attached to the word "borne." Can it be said that the tenant under the earlier lease bore the burden of supplying hot water which the respondents have now assumed as a contractual obligation? I do not think it can, unless the words "previously borne by the tenant" are to be read in a special sense which is certainly not their natural meaning.

The view taken by the Court of Appeal was that, as the landlords in the lease of 1935 were under no obligation to continue the supply of hot water, the tenant might at any time have had to supply it for himself and was therefore bearing what was called a contingent burden in respect of that service; and that, it was held, had been transferred to the respondents by the lease of 1943. On this construction of the sub-section the result in this case would be the same whether it was the previous tenant or the previous landlords who in point of fact had provided a supply of hot water, for in either case a "burden . . . . previously borne by the "tenant" would have shifted to the respondents. I think an interpretation which makes these words do this double duty and apply to two so completely different situations cannot be accepted as the intention of the legislature, unless for some very compelling reason to be derived from the nature and content of the whole legislation.

The primary objection to this construction, however, remains the difficulty of reconciling it with the language of the sub-section, which seems to demand an inquiry as to how transferred burdens which were not liabilities have actually been borne in the past. In the common usage of language a contingent burden in this sense cannot well be borne until the contingency happens. It is contingent because it is not and may never have to be borne. Denning L.J. indeed recognizes a difficulty, for he says (1): "I confess "that according to the ordinary meaning of the word 'burden' "the tenant was under no burden previously to provide hot "water." And later he adds (2): "I cannot help feeling "that the legislature had not specifically in mind a contingent "burden such as we have here. If it had would it not have "put it on the same footing as an actual burden? I think "it would."

I cannot but think that the principles applicable to the interpretation of statutes as enunciated in the judgment of Denning L.J. and followed by him in reaching this conclusion are stated rather widely. If, however, I were satisfied that this legislation, when considered in its entirety, manifested an intention which necessitated reading "burden . . . . "borne" as including a burden which would have had to be borne had an event occurred which in fact never took place, then I would be prepared to agree in the result. But I am

(1) [1949] 2 K. B. 481, 498. (2) Ibid. 499.

unable to discover such an intention. It cannot be found merely in the undoubted increase in the cost of providing services, for the policy of the legislature was, I think, clearly to stabilize rents, within certain limits, at the expense of landlords faced with mounting charges. Nor, with the word "burden" appearing in both limbs of the sub-section as well as "liability," can it be assumed that Parliament was only concerned with the legal responsibilities of those who were landlords and tenants when the rents, later to become the standard rents, were agreed.

It is no doubt true that if the appellant is correct in his submissions he will have obtained without additional payment the right to demand a service costing the respondents more than it cost the previous landlords. On the other hand, the intention to base the permitted rent on what had been negotiated in a free market is plain, and the legislature may well have assumed that a landlord who was content, in the absence of restrictions, to render his tenant a particular service voluntarily and at his own cost, had calculated the rent on that basis and with his own expenditure in mind. Such an assumption would, I think, reflect the reality of the situation in instances such as the present, for it can hardly be doubted that residential flats in a building equipped for the supply of hot water on a communal system and owned by a landlord who in practice supplied hot water would command better rents in a free market than they would if not so equipped, or if the landlord were not in fact ready and willing to use the equipment for the benefit of his tenants.

There is, therefore, some degree of hardship involved whichever of the rival contentions prevails. In one case the appellant gets a new right for nothing; in the other the respondents get an increase of rent on the basis of providing a service as though it had not been provided before, whereas in fact it was previously enjoyed by the tenant at the landlord's expense and may be taken as allowed for to some extent in the original rent. The legislature has provided no middle course applicable to this case, such as an increase of rent to cover increased charges; and there is no choice of construction open which will avoid all difficulty or maintain an exact equilibrium. On the whole, and judging from the language of the legislation, it seems to me the better view that the legislature attached importance to the de facto position respecting the previous tenancy and was not prepared to allow a landlord who had then been willing to shoulder a burden without obligation to improve his position by contracting to bear the same burden and thus gain an advantage over other property owners who had been content to bind themselves contractually throughout. But, however that may be, there is no greater certainty about the contrary view, and the proper course in such circumstances is, in my opinion, to give effect to the natural meaning of the relevant words and to hold that the burden which was previously borne in fact by the landlords was not a " burden . . . . previously borne " by the tenant."

For these reasons I would affirm the order of the Court of Appeal, but subject to the exclusion therefrom of any reference back in respect of the respondents' obligations as to the supply of hot water and the removal of refuse.

Lord Reid. My Lords, the respondents own a block of flats in Great Portland Street, London. One of these flats is occupied by the appellant. It is a dwelling-house within the meaning of the Rent and Mortgage Interest (Restrictions) Acts. This flat was not subject to rent control immediately before the passing of the Act of 1939, but, as its rateable value did not exceed 100*l*., s. 3, sub-s. 1, of that Act applied to it. It was then let for a rent of 175*l*. which is therefore the standard rent. After standing empty for some years, the flat was let to the appellant for five years from September 29, 1943, for a rent of 250*l*. There are also other terms of the lease to the appellant which do not correspond with those of the earlier lease : the respondents' obligations are more onerous and the appellant's less onerous than were the landlords' and tenant's obligations in the lease current in 1939. This appeal turns on the question whether and to what extent the respondents are entitled on that account to charge more than the standard rent.

The Rent Acts do not prevent a landlord who lets his house to a new tenant from undertaking different obligations from those undertaken by him in the lease which determined the standard rent. This lease may have imposed onerous obligations on the landlord, with the result that the rent was high. Apart from s. 2, sub-s. 3, of the Act of 1920 there is nothing in the Acts to prevent the landlord from making a valid bargain with a new tenant under which the tenant pays the full standard rent but does not get the favourable conditions contained in the last tenant's lease. Conversely, the lease which determined the standard rent may have imposed onerous obligations on the tenant, with the result that the rent was low. The landlord could of course give a new tenant more favourable conditions; but, apart from s. 2, sub-s. 3, he would not on that account be entitled to raise the rent. An agreement by the tenant to pay more in return for the alteration ot terms would be unenforceable and money paid under such an agreement would be recoverable.

Section 2, sub-s. 3, of the Act of 1920 goes some way to remove these difficulties. It does not apply to every case where the terms of a new lease are more favourable or are less favourable to the tenant than were the old terms; but it does provide for those cases where the tenant is in a more or less favourable position as a result of the transfer to the landlord or tenant of any burden or liability previously borne by the tenant or landlord. In the former case an increase of rent in respect of such transfer is permitted: in the latter case the rent must be reduced.

The most important question in this case arises out of the supply of hot water. There was in 1939 and there still is in the block of flats a system of hot-water pipes fed from a central boiler. Throughout the tenancy of the previous tenant of the appellant's flat the landlord maintained that system and supplied hot water to the flat. But he was under no obligation to do so: it is not disputed that the landlord would have been entitled at any time he chose to stop the supply. In fact he chose to continue the supply and he made no charge for it. Under the appellant's lease the landlord is now bound to provide and maintain a proper supply of hot water. In this respect the terms on which the flat is now held are undoubtedly more favourable to the tenant than they were before, and that by reason of a new obligation now borne by the landlord. So far the requirements of s. 2, sub-s. 3, are satisfied. But that is not enough: there can be no increase of rent unless the benefit to the tenant is the result of a transfer of a burden or liability previously borne by him. There was in 1939 no liability or legal obligation on the tenant to provide hot water for himself: there could not be, as a man cannot be under a legal obligation to himself. But it is admitted that in a flat of this character a supply of hot water was a practical necessity: someone had to incur the trouble and expense necessary to provide it.

So if "burden" is synonymous with "liability" there was neither burden nor liability on anyone in 1939; but, if burden is an apt word to denote the cost of supplying a practical necessity, then there certainly was a burden on someone. It is generally to be assumed that if the legislature adds one word to another it does not intend both to mean the same thing. There may of course be some reason for holding that the two words are synonymous, but here I think that everything points to the word "burden" being intended to have a wider meaning than "liability." It is not readily to be assumed that the legislature meant that a landlord could charge for undertaking to do something which the tenant was previously bound by law to do, but could not charge for undertaking to do something which the tenant was previously bound by necessity to do. I think that the meaning of "burden" is such that the landlord is entitled to charge in the one case as he is in the other, and that the supply of hot water was a burden on someone.

The more difficult question is to determine by whom the burden was borne during the previous tenancy. It was the tenant's burden in the sense that he had to shoulder it except in so far as someone else was kind enough to bear it for him. But in fact someone else did bear it for him throughout the tenancy. The statute requires that there shall be a "burden "or liability previously borne by the tenant." If someone else were gratuitously to discharge a continuing liability which legally fell on the tenant, it might not be so difficult to hold that nevertheless the liability continued to be borne by the tenant. It is I think more difficult to reach that result if the word "burden" is taken by itself; but, taking the whole phrase, I have come to the conclusion, not without some hesitation, that a burden which someone else gratuitously bore for the tenant can be regarded as having been borne by the tenant if there is good reason for adopting that interpretation rather than the more natural and literal meaning. I think that there is good reason here because the literal meaning would lead to some strange results.

To take one example, suppose that this landlord had decided during the last tenancy that he could no longer afford to carry the tenant's burden. If he had been high-handed, he could have cut off the hot water, allowed the tenant to carry the burden for a short time and then agreed to resume the supply on payment of extra rent. There could then be no doubt that the burden was borne by the tenant before the extra rent was charged, and therefore to charge extra rent would be permissible. But a reasonable landlord would not have done that : he would have told the tenant that unless he were paid for the hot water he would have to cut it off. An agreement to pay extra rent would then be reached without the burden having in fact been transferred to the tenant's shoulders. On the literal interpretation of the words "previously borne by the tenant" that agreement would not comply with the requirements of s. 2, sub-s. 3, and would not be valid. I do not think that one is driven to that result. I have come to the conclusion that the burden of supplying hot water can properly be regarded in this case as having been previously borne by the tenant. I have not discussed the authorities which were cited in argument, as I do not think that the conclusion which I have reached is inconsistent with any of these decisions. I should add that there are two other matters of less importance with regard to which the terms of the appellant's lease also place him in a more favourable position than that of the previous tenant—obligations to repair and as to the disposal of refuse. I agree that they must also be taken into account.

There is one other argument that I should notice. The statute requires that the increase of rent shall be "in respect of" the transfer of burdens. In this case, when the parties agreed to the terms of the appellant's lease neither of them realized that there was a standard rent or knew what were the terms of the previous lease. It is said that an increase of rent can only be "in respect of a transfer" if the parties when negotiating know the amount of the increase and what burdens are being transferred and accept the one as the counterpart of the other. It would be most unusual that the validity of an agreement should depend on what took place when it was being negotiated, and I do not think that that is the meaning of this phrase. "In respect of" is not a phrase of very precise meaning, and I do not think that it need have the meaning sought to be attributed to it.

It was also argued that a notice giving particulars of the increase had to be given before the increase could take effect. It is true that ordinarily an increase of rent under the Acts must be preceded by such a notice ; but s. 2, sub-s. 3, enacts that an increase of rent in respect of a transfer of a burden or liability shall be deemed not to be an increase of rent for

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the purposes of the Act. Accordingly, those provisions of the Acts which require notice of increases of rent have no application to increases under s. 2, sub-s. 3. I therefore think that if there has been a transfer of burdens and if the increase of rent is now found to be not more than the equivalent of this transfer, then the statute is satisfied and the increase is recoverable. In this case it has not yet been decided whether the increase of 75*l*. is justifiable or is excessive. I agree that inquiry into this is necessary, and that if it is found that the increase is excessive only that part of it which is justified is payable by the appellant.

Appeal dismissed.

Solicitors: *Kennedy, Ponsonby & Prideaux; Griffinhoofe & Brewster.*

J. C.*

1950

May 8

[PRIVY COUNCIL]

LEVER BROTHERS AND UNILEVER N. V. AND OTHERS . . . . APPELLANTS;

AND

HIS MAJESTY'S PROCURATOR GENERAL RESPONDENT.

The UNITAS

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE AND ADMIRALTY DIVISION (IN PRIZE).

Shipping—Prize—Conclusiveness of enemy flag—Whether flown involuntarily—Threat to economic interests—Flag inconclusive in very exceptional circumstances only.

The first appellant was a Dutch corporation which, through other Dutch corporations (the second and third appellants), owned subsidiary companies in and incorporated in Germany, the boards of directors of the latter having no authority to deal independently with policy or management. The immediate ownership of a vessel—one of a fleet of whaling ships built and registered in Germany by the first appellant—was vested in one of those subsidiary companies, in whose name it was registered, and when it was seized and captured it was flying the German flag. The appellants, claiming that the condemnation of the vessel in prize was not justified, alleged that the flying of the German flag was involuntary because, it was said, if the first appellant had not agreed to the proposal of the German authorities to build the whaling fleet in Germany for operation under the German flag, they had reason to believe that effective steps would have been taken by the German Government to confiscate or render virtually valueless the corporation's assets in Germany and to restrict to the minimum any further carrying on of its business in Germany.

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*Present: LORD PORTER, LORD SIMONDS, LORD NORMAND and LORD MACDERMOTT.

Held, that, while there might be exceptions to the general rule that the flying of an enemy flag in wartime was conclusive of the nationality of the ship, the circumstances which made the flying of the enemy flag inconclusive must be very exceptional, and the present case was far removed from those exceptional cases in which the general rule might be discarded; that the building of the whaling fleet and its German registration were not involuntary in the sense of being unintentional; that they were a deliberate choice taken between two distasteful alternatives; that the appellant corporation made its election; and that a conclusion that a shipowner who built his ship, unwillingly it might be, but still with the object of avoiding a position less favourable to himself, and sailed her under an enemy flag, would avoid seizure and condemnation in prize in the event of war, was altogether unjustified.

The Vrow Elizabeth (1803) 5 Ch. Rob. 2, at p. 6; *The Fortuna* (1811) 1 Dods. 81, at p. 87; *The Primus* (1854) Spinks P. C. 48, 50; *The Tommi* [1914] P. 251, at p. 256; *The Pontoporos* (1915) 1 Br. & Col. P. C. 373; and *The Carolina* (1802) 4 Ch. Rob. 256, referred to.

Decree of the President [1948] P. 205, affirmed.

APPEAL (No. 2 of 1949) against a decree by the President of the Probate, Divorce and Admiralty Division of the High Court of Justice sitting in Prize who (February 20, 1948) pronounced that the steamship *Unitas* belonged at the time of capture and seizure to enemies of the Crown and was liable to confiscation as good and lawful prize. The President gave leave to appeal subject to the provision of security for costs of the appeal, and directed that the decree should be suspended pending the appeal.

The following facts are taken from the judgment of the Judicial Committee:—The *Unitas* was a whale factory-ship of about 21,000 gross registered tonnage. The evidence on behalf of the Crown was confined to the formal affidavits of seizure and ship's papers, from which it appeared that throughout her life, from the date when she was built in 1937 until she was seized, she was registered in the Port of Bremen,

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Germany, and was of German nationality. At all material times her immediate ownership was vested in a German limited liability company known before June, 1939, as Jurgens-Van den Bergh Margarine Verkaus Union G.m.b.H., and thereafter as Margarine Verkaufsunion G.m.b.H., referred to hereafter as "Verkaufs." She was registered in the name of "Verkaufs," and at the date of capture and seizure was flying the German flag. At the time of the unconditional surrender of Germany she was lying in the port of Wilhelmshaven, in Germany, and was there captured by H.M.S. *Royal Alexandra.* After capture she was transferred to Methil, in the County of Fife, and there formally seized in prize on July 1, 1945.

The writ herein was issued on the 17th of that month, and on August 10, 1945, an appearance was duly entered on behalf of the first appellants, Lever Brothers and Unilever N.V. of Rotterdam, referred to hereafter as N.V., as parties interested in the ship. On June 18, 1946, further appearances were entered for the second appellants, Marga Maatschappij tot Beheer van Aandeelen in Industrieele Ondernemingen N.V., referred to hereafter as "Marga," and the third appellants Saponia Maatschappij tot Beheer van Aandeelen in Industrieele Ondernemingen N.V., referred to hereafter as "Saponia," as parties interested in, and as beneficial owners of, the ship. On January 7, 1947, a claim was filed on behalf of all those appellants as parties interested in, or as beneficial owners of, the ship, tackle, apparel and furniture. An additional claim was filed at the same time for all losses, costs, demurrage and expenses by reason of her seizure and detention as prize, but was abandoned before their Lordships, it being admitted that the seizure, but not the condemnation, was justified.

"N.V." was a Dutch corporation. Its shares were publicly held, mainly by British and Dutch nationals, and it owned the entire share capital of the second and third appellants, both of whom were also Dutch corporations. They, in their turn, jointly owned the entire shares of a company incorporated under the laws of Germany, named Margarine Union Vereinigte Oel-und Fettwerke A.G., hereafter called "Margarine "Union," and Margarine Union owned the entire share capital of Verkaufs. It was not disputed by the respondent that the general control of the German companies in the organization through which N.V., "Marga" and "Saponia" carried on business in Germany was at all times exercised by N.V. in and from Rotterdam. Though the companies in Germany had their own boards of directors, those boards had no authority to deal independently with policy or management. N.V. appointed a body in Berlin known as the praesidium, the principal members of which were of Dutch nationality, and that body controlled N.V.'s German businesses and ensured that the decisions taken in Rotterdam were effectively carried out.

The respondent maintained that condemnation of the *Unitas* was justified on two main grounds, first, that she flew the German flag, and, secondly, that the legal title to her was vested in Verkaufs. In answer to the first of those contentions the appellants submitted that the flying of an enemy flag was only a prima facie ground for condemnation, and was subject to exceptions which covered the present case. As to the second, they maintained that it was the duty of the Prize Court to look behind the legal facade and determine where the true ownership of the *Unitas* lay, and that on the principles laid down in the House of Lords in *Daimler Co., Ld.* v. *Continental Tyre & Rubber Co.* (*Great Britain*), *Ld.* (1), as applied to prize in *The St. Tudno* (2), the whole and sole ownership in the ship was—in this case as it was in that—in every real and business sense in the beneficial owners. The respondent on his part maintained that the principles laid down in the *Daimler* case (1) might be effective, in a case where the legal ownership was in a friend or neutral, to disclose an enemy beneficial ownership and so lead to condemnation, but would not dispose of enemy taint where the legal ownership was that of an enemy. But in any case he maintained that if it were permissible to treat Verkaufs as a mere branch of N.V. then Verkaufs was a "house of trade" of N.V. in Germany, and that, in that event, since the *Unitas* was the concern of that house of trade, it was the duty of N.V. on the outbreak of war between the United Kingdom and Germany on September 3, 1939, to dissociate itself from Verkaufs. That duty they did nothing to fulfil between the outbreak of war and the invasion of Holland in May, 1940, and for that further reason the *Unitas*, as a concern of the German house of trade, was condemnable in prize.

The President decided in favour of the respondent on the ground that the vessel's flag was decisive of her enemy character. He held that, even if there were exceptions to the rule as to the enemy flag, the present case did not fall within them. He agreed with the respondent's second submission that the principle of the *Daimler* case (1) did not apply even if it were established that the beneficial ownership was that of a friend or neutral, and further held that N.V. had failed between September, 1939, and May, 1940, to dissociate itself from Verkaufs.

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(1) [1916] 2 A. C. 307.

(2) [1916] P. 291.

1950. March 1, 2, 7, 8 and 9. *Sir Walter Monckton K.C.*, *Sir William McNair K.C.* and *Eustace Roskill* for the appellants. In April, 1935, an attempt was made by the German authorities to persuade N.V. to build a whaling fleet, including the *Unitas* as a factory ship, and, though pressure was used, they resisted for a time. Then in May, 1936, Dr. Schacht, the minister concerned, having said that he relied on N.V. to cause a ship to be built, they ultimately undertook to do so, but it was not a thing which they wanted to do. Although the *Unitas* was flying the German flag and was registered in Bremen, all the beneficial interest in her was held by the appellant Dutch corporations, and the control of the German subsidiary, in whose name the ship was registered, was in its policy and the direction of its work wholly done from Rotterdam. The case for the appellants is that this is not an instance of a claimant who has chosen the flag of the enemy with such benefit as that might bring, and therefore must take such inconvenience as follows: it is a case in which there was no voluntary acceptance of the German flag, but it was something which, in the circumstances N.V. was driven to do by pressure. This is probably the first case in which the board will have to consider the impact of the totalitarian Nazi regime on a business which was being carried on by neutrals in Germany, and see what effect it had as between neutrals and enemies from the point of view of the prize court.

There are two main points. First, it has been said that the rule is that the enemy flag is conclusive in favour of capture. It is submitted that that is not so, that it has always been a matter subject to exceptions, and that it is only conclusive in cases where there has been a voluntary choice to accept the benefit of the enemy flag for commercial convenience. If the appellants succeed on that, and the flying of the flag is not conclusive, then the question is whether N.V. did voluntarily choose the enemy flag in this case. The other main point is the question whether the legal ownership of the ship by, and its registration in the name of, a limited company incorporated according to the law of the enemy, is conclusive as to the national character of the ship. In that connexion it will be necessary to examine the recent prize cases in which the principle in *Daimler Co., Ld.* v. *Continental Tyre & Rubber Co. (Great Britain), Ld.* (1) has been applied to prize law, and to look behind the legal ownership back to the parent company to see if it is true that that parent company controls and is in every real business sense the owner of the ship.

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(1) [1916] 2 A. C. 307.

If it be right that the rule of the flag is capable of exceptions, and if it be right that it only applies in cases where someone has voluntarily accepted the flag, then the question is whether the appellants can be bound by the flag though, so far from their having chosen it, it was thrust on them against their will. [The evidence relevant primarily to the two main questions—whether there was a choice, and where the control, in the real business sense, lay—was then read, in particular the affidavit of Paul Rykens, the chairman of N.V., to show what he said established pressure by the German authorities.] All this happened three years before the war actually took place; but, in the light of the situation in Germany in 1936, and the pressure that was applied to N.V., there was no reason to think that there would be the slightest renunciation by the German Government of its determination to compel N.V. to go on using the German flag for its fleet. It is clear from the authorities that the prize court goes behind legal technicalities and the form of commercial relations to get at the reality and substance of the facts; and, having done that, it applies to those facts established principles of international law, and applies the same international law whether sitting in London or in Hamburg: *The Zamora* (2). It might be that a German court in Hamburg, appying the same international law, might have condemned the *Unitas* as a Dutch ship, and a British court on the same facts and on the same international law have condemned it as a German ship.

It is clear on the authorities that the flag, whether enemy or neutral, is not, and never has been, in all cases conclusive: it is firmly established that there can be exceptions. *The Vigilantia* (3) is not itself a case which proves that the enemy

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(1) [1916] 2 A. C. 307.
(2) Ibid. 77, 91.
(3) (1789) 1 Ch. Rob. 1, 11, 13.

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flag is conclusive, it rather proves that the neutral flag is not conclusive. In *The Vrow Elizabeth* (1), a neutral-owned ship was placed under the enemy flag to get the advantage of enemy trade; in that case there is the admission of exceptions. In *The Fortuna* (2) the basis of the rule is stated to be the voluntary acceptance of the benefit of the flag. Neither *The Ariadne* (3) nor *The Freundschaft* (4) are cases where the conclusiveness of the flag is in question. *The Vrow Elizabeth* (5) was cited in *The Primus* (6), and there is no suggestion of difference from it: emphasis is laid on the reaping of the benefit and the correlative obligation: "if he reap the benefit "accruing during peace, he must also take the consequences "of war."

That case is in line with the submission that the basis of the rule is the voluntarily assumption of the flag for one's own benefit. *The Industrie* (7) decided that pre-war investment in a ship under the enemy flag is not sufficient to take it out of the principle. *The Ocean Bride* (8) does not carry the matter much further—it repeats the principle—but reliance is placed on it for asking the prize court to look at the realities of the case. *The William Bagaley* (9) also refers to the general proposition—it says that it is only a general rule—and there may be exceptions. One such exception was *The Palme* (10). It is submitted that, in view of what has been said about the possibility of exceptions, there is no reason to suppose that in such a case as *The Palme* (10) the English courts would have taken a different view from that which was taken by the French court. *The Pedro* (11) also gives support to our submission as to the basis of the rule. Then, to come to the 1914–18 war, *The Leda* (12) is a case of voluntary acceptance, a choosing of the German flag for reasons of commercial convenience. *The Tommi* (13) followed. Then came the *Daimler* case (14), in which it was said that the test of nationality was determined by the place of control, and that had its effect on the prize cases and the flag principle. *The St. Tudno* (15) was the first case of the application of the

(1) (1803) 5 Ch. Rob. 2, 6.
(2) (1811) 1 Dods. 81, 83.
(3) (1817) 2 Wheat. 143.
(4) (1819) 4 Wheat. 105.
(5) 5 Ch. Rob. 2.
(6) (1854) Spinks P. C. 48, 50.
(7) Ibid. 54.
(8) Ibid. 66.
(9) (1866) 5 Wallace 377.
(10) Dalloz, Jurisprudence General (1872) Pt. III, 94.
(11) (1899) 175 U. S. 354, 357.
(12) (1914) 1 Br. & Col. P. C. 233, 236.
(13) [1914] P. 251.
(14) [1916] 2 A. C. 307.
(15) [1916] P. 291.

Daimler (1) principle in prize, and shows that the prize court recognizes that in such a case as the present the real ownership is in the parent company, and one looks in vain for any suggestion of this being a one-way rule. The President said " in my opinion, there is no authority for applying the principle " of the *Daimler* case (1) in favour of claimants in prize, " though it is clearly applicable in favour of the Crown " (2), and he cited *The Glenroy* (3). The *Daimler* case (1), as applied to the question of ownership, says that it lies where the control is. *The Glenroy* (3), it is submitted, is using the *Daimler* case (1) in reverse. [Reference was also made to the *Hamborn* (4).]

To summarize on this point : although the enemy flag prima facie indicates the nationality of the ship, it is not conclusive, and the cases, beginning with *The Vrow Elizabeth* (5), suggest that there are exceptions and special circumstances. There is not very much indication as to what the special circumstances are, but the ground of the rule is that if one has voluntarily accepted the benefit of the flag at a time when it has been useful it cannot be said afterwards that it does not fairly indicate the nationality of the ship. If, however, in this particular case it is shown that, so far from their having chosen the flag, it was forced on N.V., then it can be said here that this is a case in which the Board ought not to stop at the flag, but should look at all the circumstances to see whether it is a case for condemnation, or one in which it is a Dutch-owned and controlled ship in the eyes of the prize court. The appellants have to satisfy the Board on the facts that here is a case in which it can genuinely be said that it does not fall within the principles of the voluntary choice. There is no question that N.V. were approached by the German Government, and it is equally obvious that they were not anxious for this transaction. There is no direct evidence of threats, but it is the threats lying behind that require consideration. N.V. did not deliberately choose the German flag : they had no choice.

If it be right that the enemy flag is not conclusive, and other things can be looked at, there then arises the point about the ownership and registration of the ship being in the name of the German company. If the flag is not conclusive, nor is the fact that the legal ownership is in the German company: the *Daimler* case (1); *The St. Tudno* (2); *The Hamborn* (3). In those cases it was the parent company which in the eyes of the prize court was the real owner and controller of the ship. The test is, where does the right of control lie. In the present case the real and true ownership is in the claimant and not in Verkaufs. The fact that the Nazi power would intervene does not destroy the right of the claimant to say that this was his ship tested by the right of control.

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(1) [1916] 2 A. C. 307.
(2) [1948] P. 219.
(3) [1945] A. C. 124, 137.
(4) [1918] P. 19, 24 ; [1919] A. C. 993, 996.
(5) 5 Ch. Rob. 2.

Assuming that the appellants have succeeded so far, the point remains that Verkaufs is to be regarded as a branch of N.V., and therefore N.V. itself would be treated as a neutral with a house of trade in enemy country, and that therefore it ought to have dissociated itself from Germany within the period of the locus poenitentiae. *The Anglo-Mexican* (4) states the principle; it shows that the rule of dissociation is part of the rule that deemed enemy or non-enemy character of goods is determined by the commercial domicile of the owner. Finally, the appellants abandon any claim to damages.

Sir William McNair K.C. followed. The case really comes before this Board as one in which, using the language of Rykens in his affidavit, "the construction of the whaling "fleet was not voluntarily undertaken by N.V. nor was it "a freely chosen investment which N.V. decided to make of "their own volition." If that statement of fact is accepted for the truth, then the case is brought primarily and squarely within the exceptions as to conclusiveness of the enemy flag. There is no distinction in substance between threatening an individual with personal violence and the loss of his life and threatening a company with loss of its business, because the company only exists for carrying on its business. If the facts stated in that affidavit are accepted, then the case falls clearly outside the principle of the conclusiveness of the flag: *The Fortuna* (5). If it falls outside the principle of the rule, then it falls within the exceptions.

The President said in his judgment, as an answer to the argument that the principle in the *Daimler* case (1) must be applicable in favour of the claimants, that "if the *Unitas* "had been duly condemned by a German prize court, her

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(1) [1916] 2 A. C. 307.

(2) [1916] P. 291.

(3) [1918] P. 19, 24; [1919] A.C. 993, 996.

(4) [1918] A. C. 422, 425.

(5) 1 Dods. 81.

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"status would thereby have been determined in face of the "world. Therefore, if she subsequently came before a British "prize court her case would fall to be dealt with not in spite "of, but in light of, the fact that she had already been con-"demned to the German government by a court of com-"petent jurisdiction" (1).

But any prize court applying the same international law to the same state of facts ought not to get a result that a British prize court condemns the ship as German and the German prize court condemns it as Dutch. If that result follows there is some flaw in logic which produces it. The German prize court would have condemned her, on the principle of *The St. Tudno* (2), as being a Dutch ship notwithstanding that she flew the German flag. [Reference was also made to *The Polzeath* (3).] What is important in the application of this doctrine is the de jure right of control, and that right of control continued in N.V. throughout, and that is sufficient to make the assets of Verkaufs properly to be regarded as assets of N.V. In *The Glenroy* (4) the German company was regarded as being a mere branch of the Japanese business and as having no legal entity. That enables the appellants to say that Verkaufs was just as much a creature of N.V. as if it were a branch office of N.V. staffed by N.V.'s servants.

Next, there appears to be nothing in the authorities which says that the *Daimler* rule, as distinct from the flag rule, is a rule for one-way operation. There are indications that the conclusiveness of the flag is a rule which operates wholly in favour of the captors. De facto control of the ship as distinct from control of the company is irrelevant. It was said, assuming that the Dutch had entered into this transaction under pressure, that the mere fact that the ship was under enemy control made it condemnable. That, it is submitted, would be to erect a new ground of condemnation: *The Ocean* (5). If this condemnation is upheld, the general result will be to enable the Crown to claim this vessel for nothing and to sell her to her trade rivals, and the only persons who will be injured will be, not German subjects, but subjects of a true ally. If that is the result of the application of the principles for which the Crown contends, they should be very closely scrutinized.

Le Quesne K.C. and *Quintin Hogg* for the respondent.

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(1) [1948] P. 219.
(2) [1916] P. 291.
(3) [1916] P. 241, 243.
(4) [1945] A. C. 124.
(5) (1804) 5 Ch. Rob. 90.

Unless the appellants are able to satisfy the board that the rule as to the conclusiveness of the enemy flag does not apply in this case their claims fail. The rule itself is admitted, but it was suggested that it is subject to certain limitations or exceptions, and that this case falls within one of them. It was suggested that the rule is subject to the limitation that the application of it must be to the detriment of the enemy, not to the detriment of a belligerent friend or of a neutral. It is, of course, true to say that in the ordinary way there could be no question that the application of the rule will injure the enemy, not the neutral; but the rule in fact has not been so limited, and it is submitted that the reported cases show that the courts will not shrink from applying the rule even though the result might be injury to a neutral or to a country before whose prize court the case comes: *The Ocean Bride* (1); *The Manchuria* (2). There does not appear to be any reported case in which the legal owner was a British subject and the ship was in fact flying an enemy flag when she was captured.

The earliest reported case in which a prize court had to consider the position when there is a vessel which is owned by a corporation, a national of an enemy country, the shares of which belong to another country which is a neutral, is *The Pedro* (3). That was a case of a ship-owning enemy company, the whole of whose stock was held by neutrals; and nevertheless the vessel was condemned. On the same point see also *The Marie Glaeser* (4), in which the President assumed that the claimants, who were British, were actually the owners of the whole of the ship. Nevertheless she was flying the German flag and was condemned. This rule of the flag has been stated in various ways by text-book writers, though the effect has always been the same: Hall's International Law (8th ed.), pp. 596–7—that statement is made without any qualification whatever; Wheaton's International Law (6th ed.), p. 694—again, there is an unqualified statement that in time of war a vessel is bound by the flag which she carries to the exclusion of any claim of interest which neutrals may have. In the note on p. 425 of Wheaton's 8th American edition, dealing with the subject of the flag, the adverb used is "knowingly" not "voluntarily." So far as there is any qualification of the rule, it is only such as can be extracted from the word

(1) (1854) Spinks P. C. 66, 73.
(2) (1905) 2 Russ. & Jap. P. C. 52, 55.
(3) 175 U. S. 354, 368.
(4) [1914] P. 218, 238–9.

"knowingly." Note (5.) on p. 225 of Oppenheim's International Law (6th ed.), vol. II, is inserted for the purpose of showing what, in the view of the French Admiralty, constituted an enemy ship, and one matter is an enemy flag: there is no hint in note (3.) on p. 226 of any such qualification or limitation of the rule as is now being suggested. Also, in art. 15 of the Netherlands Government Instructions, 1940, that government treats a vessel as bearing an enemy character by reason of the fact that it flies an enemy flag.

On the reports generally, there does not appear to be any case in which a vessel which, at the date of seizure was flying the enemy flag, has been released, except there may be some ships which flew the Dutch flag at a time when it was an enemy flag in the Napoleonic war and which nevertheless escaped condemnation. But those are the very exceptional cases which are mentioned in *The Vrow Elizabeth* (1). That was a very special case, for the State itself allowed the vessel to fly the enemy flag. Another special case is *The Palme* (2), in which it was said, in effect, that they had undoubtedly a right to condemn the ship, but that in the circumstances they would not. The only other obviously very special case is *The Taxiarchis* (3). Those are all illustrations of what are called in one or two of the old judgments "exceptional or very "exceptional" circumstances in which the rule was not applied. Those are the only cases it has been possible to discover in which a vessel flying an enemy flag at the time of capture has escaped from condemnation, and they are, it is submitted, very far removed from the facts of this case.

Coming now to the cases which really, perhaps, represent the main ground on which the claim is put, it is said that there are expressions of the following kind which are sufficient for the purposes of the appellants: "if you reap the advantages "you must accept the inconveniences"; "the flag which "had been voluntarily chosen." There is no ground for thinking that the judges who decided the cases in which those expressions occur would have taken the view in the circumstances of this case that the appellants did not choose the German flag, or would have taken the view that the rule of the flag did not apply because the appellants acted under pressure. Looking at the cases as a whole, it is a perfectly clear inference that the judges, who knew of these expressions, would have regarded, and would have treated, the appellants as having made a choice of the German flag. They had to make a choice between the alternatives, neither of which was pleasing, of annoying the German government, with all the consequences, or of accepting a proposal some, at any rate, of the terms of which they disliked. It is not possible to say that the choice that they made was not a free one. The question of the flag was only one of many matters in the mind of the appellants during those negotiations. The assent here was given in time of peace on the calculation of the advantages and disadvantages one way or another. The facts of this case clearly justify the statement that there was an assent: *The Pontoporos* (1). If this matter is one which prize courts are going to investigate, the answer should be that this cannot be said not to have been the appellants' choice. The contrary view would involve that it is very difficult to know where it is going to end.

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(1) 5 Ch. Rob. 2, 7.

(2) Dalloz, Jurisprudence General (1872), Pt. III, 94.

(3) (1914) 20 R. G. D. I. P. 518.

As to the suggestion that to resist this claim involves the proposition that this vessel might have been condemned by two prize courts—the German and the British—that assumes that the German prize court would have condemned this ship. That must not lightly be assumed. There is nothing in the fact that she might be condemned in a British prize court and at the same time be liable to condemnation in a German prize court; the grounds might be quite different in the two courts, and would not involve any contradiction between the two judgments.

The argument, so far, has been on the rule about the flag, but there is the further difficulty that the *Unitas* was enemy-owned—by a German company—and with a view to getting rid of the difficulty the appellants appealed to the *Daimler* case (2). It is submitted that that case is no authority for the proposition that N.V. ought to be, and can be, treated as being the owners of this ship. That case does not apply to a question of property; it only related to the possibility that a company incorporated in England might acquire an enemy character because of enemy control: the *Daimler* case (2); Oppenheim's International Law (6th ed.), p. 222; the British Year Book of International Law, 1927, pp. 163–4. This suggested application of the *Daimler* decision was not referred to when the second *Glenroy* case (3) came to the Privy Council. Anything that was laid down by Lord Parker in the *Daimler* case (2) would not enable it to be contended that the legal ownership of the *Unitas* passed to the appellant company instead of remaining in the German company.

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(1) (1915) 1 Br. & Col. P. C. 371, 382.

(2) [1916] 2 A. C. 307, 340, 344–6.

(3) [1945] A. C. 124, 136.

In *The Noordam* (*No.* 2) (1) Lord Sterndale took the view that as he was dealing with property the *Daimler* case (2) did not apply. In *Continho Caro & Co.* v. *Vermont & Co.* (3), Atkin J. stated his view of the effect of what was laid down by Lord Parker in the *Daimler* case (2): see also *The Hamborn* (4). The *Daimler* decision (2) does not turn somebody who is not the owner into the owner. The claim that is made here is that the claimants have something called beneficial ownership. The legal ownership never moved from the German company. The proposition that someone who is not the legal owner is entitled to come into the prize court and claim the property is an entirely novel one. Cases in which it has been said that only the legal owner can claim are *The Tobago* (5) and *The Leda* (6). [Reference on this point was also made to *The Proton* (7) and *The Glenroy* (8).] The appellants cannot possibly succeed, because they are not the legal owners; it would not be true to say that in the circumstances of this case Verkaufs were completely under the control of the neutral company.

The remaining point arises out of the facts that Verkaufs was a house of trade in Germany of the appellant company, and that the *Unitas* remained at all times the property of that house of trade and continued in the trade. That state of affairs has been considered in one or two cases: *The Portland* (9); *The Freundschaft* (10); Oppenheim (6th ed.), p. 228. It was for the appellants, if they wished to escape the consequences of those facts, to take such steps as would have that effect by placing before the prize court information on what they were actually doing in the relevant period of time: *The Manningtry* (11). As to what steps the neutral might have taken, see *The Anglo-Mexican* (12): he might have discontinued the business. The appellants were in the position of having a hostile commercial domicile; and, unless they succeeded in getting rid of it, the *Unitas*, which was the property of the house of trade in the enemy country, was liable to condemnation. The usual application of this principle is in respect of goods and not ships, but the principle is fairly applicable to any chattel, including a ship. It is not shown, on the possibility of discontinuing business altogether and thereby dissociating themselves from their enemy house of trade and losing their commercial hostile domicile, that it makes any difference that the whole of the difficulty arises out of the action by the German Government. But, assuming that it did, that would not make any difference to the result.

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(1) [1919] P. 255, 259.
(2) [1916] 2 A. C. 307, 340, 344-6.
(3) [1917] 2 K. B. 587, 590.
(4) [1919] A. C. 993, 998.
(5) (1804) 5 Ch. Rob. 218.
(6) 1 Br. & Col. P. C. 233, 238.
(7) [1918] A. C. 578, 584.
(8) [1943] P. 109, 124–5.
(9) (1800) 3 Ch. Rob. 41, 52.
(10) (1819) 4 Wheat. 105, 107.
(11) [1916] P. 329, 343.
(12) [1918] A. C. 422, 433.

Hogg following. From beginning to end of prize law there is always this principle underlying the whole subject, whether one is dealing with vessels or goods, that the belligerent has a right to seize what is in fact part of the enemy commerce—part of the mercantile marine of the enemy nation. The whole of the appellants' case depends on the proposition of mixed fact and law that the *Unitas* was never part of the commerce or mercantile marine of Germany, but was a Dutch ship. If they establish that proposition the ship could not be condemned. There are many ways in which a ship can be invested with an enemy character; there is only one way in which goods or a ship can be innocent, and that is by not becoming part of the commerce of the belligerent. The only view of the facts which is open is that the *Unitas* was part of the Third Reich: there is a German flag, German construction, German-owned and registration, German corporation, German use for whaling purposes, and not under the control of the appellants; and the vessel was constructed in order to supply Germany with a much-needed raw material. This ship was so irretrievably part of the commerce of the German Third Reich that the alleged owners, the claimant-appellants, were unable, or afraid, at any time—because one or the other must be true—to remove her from that position.

The rule of the flag is really one which applies to vessels as distinct from goods. The basis of the rule does not involve an investigation of the reasons why the flag is flown: it is based on the authority of the country giving its flag to the vessel. The motives for flying the flag are not in issue. There is no doctrine whereby a party can say to an innocent party, "I am entitled to disregard this act because it was done "under threat that I should become poorer"; and that is alleged to amount to duress in law. There is no warrant in principle or decided cases for any such doctrine, except in the extremely limited sphere which is described in the President's judgment as being duress of goods in English municipal law. With regard to the *Daimler* case (1), it is submitted that the appellants seek to violate the whole language of Lord Parker's speech. On the enemy house of trade point, inasmuch as the underlying principle of prize law is whether or not the thing seized is part of the commerce of the enemy, and inasmuch as that no less underlies the law regarding commercial domicile and house of trade, a person who happens to trade in a belligerent country has either to discontinue that trade altogether or, as regards the assets of that particular house of trade, he has to discontinue that business altogether if he wishes to avoid the consequences that flow from it.

Sir Walter Monckton K.C., in reply. It is clear from the authorities that the rule of the flag is subject to exceptions. It is not sought to argue here that there is a limitation to cases where the detriment will be to the enemy and not to an ally or a neutral. In seeing what exceptions are permissible the basis of the rule is looked at. The question of pressure to fly the flag is one of degree in the last resort. On the fact that this was pre-war pressure: see *The Carolina* (2) and *The Pontoporos* (3); The Board is entitled to look behind the flag in the light of the facts. If the appellants are not bound by the enemy flag, then the question is whether their case is concluded by the German ownership in Verkaufs. In the prize courts the application of the *Daimler* principle (1) has resulted in the effect that the appellants ought to be entitled to succeed: *The St. Tudno* (4). It must be seen in whom the power of control lies; all the shares were in N.V., and there can be no doubt who, in the real and business sense, was the owner: it was N.V. and not Verkaufs: see *The Hamborn* (5); *The Glenroy* (6). With regard to the house of trade point, the rule requires that the person who wishes to escape from the disadvantages of having a house of trade should dissociate himself, having an opportunity so to do: *The Gerasimo* (7). In the present case there was not the opportunity to transfer the assets of Verkaufs out of Germany at any relevant time.

May 8. The judgment of their Lordships was delivered by LORD PORTER, who stated the facts set out above and

(1) [1916] 2 A. C. 307, 344–5.
(2) (1802) 4 Ch. Rob. 256.
(3) 1 Br. & Col. P. C. 371.
(4) [1916] P. 291, 294.
(5) [1919] A. C. 993.
(6) [1945] A. C. 124, 137–8.
(7) (1857) 2 Roscoe's Eng. P.C. 577.

continued :—Having regard to the importance of the interests involved and in view of the likelihood of an appeal to their Lordships' Board, the President dealt fully with each of the three contentions put forward in order that full assistance might be afforded on appeal to their Lordships in considering each aspect of this case. But, as the Board think that the flying of the enemy flag alone is in this, and in most cases, sufficient to dispose of the matter at issue, they refrain from expressing any opinion on the other two difficult and controversial matters.

Prima facie, of course, the flying of an enemy flag in wartime is conclusive of the nationality of a ship and subjects her to seizure and condemnation in a court of prize. If it is done voluntarily it is conclusive ; but, say the appellants, if under duress or, indeed, under pressure and against the will of the owner of the ship, it is but an element to be taken into consideration and may well be inconclusive.

For this argument reliance is placed on the expressions over and over again appearing in the cases which begin with Sir William Scott's words in *The Vrow Elizabeth* (1) : " In that " case [viz., an earlier unreported case], however, it was held " that the fact of sailing under the Dutch flag and pass was " decisive against the admission of any claim ; and it was " observed that as the vessel had been enjoying the privileges " of a Dutch character, the parties could not expect to reap " the advantages of such an employment, without being " subject at the same time to the inconveniences attaching on " it. When I lay down this rule, I do not say that there may " not be cases of such particular circumstances, as to raise " a reasonable distinction. The treaty of Amiens had stipu-" lated for the liberty of withdrawing British property " from the ceded and restored islands. But the Governments " of France and Holland afterwards refused to suffer such " property to be exported from these colonies, otherwise than " in ships of France or Holland, and on a destination to those " countries. The difficulty which has arisen in the removal " of British property, for want of shipping, may have induced " our own Government to permit British ships to put them-" selves under Dutch flags for this particular purpose ; and " in such cases the particular situation of affairs arising out " of this refusal to execute the treaty, may have entitled such " parties to a relaxation of the general rule."

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(1) 5 Ch. Rob. 2, 6.

This consideration was repeated in *The Fortuna* (1), in the words of the same judge: " All that the court has thrown " out respecting the effect of the flag and pass is this, that the " party who takes the benefit of them is himself bound by " them." He adds what is germane to another aspect of this case, " But they do not bind other parties as against him."

It will at a later stage be desirable to analyse the width of the exception to which Lord Stowell refers, but at the moment the quotations set out above are examples of those relied on by the appellants in support of the proposition that to be bound by the rule of the flag the shipowner must voluntarily adopt it and not be coerced into its use.

For the allegation that their act was involuntary, the appellants lay stress on the statements endorsed in Ryken's affidavit. They may be summarized as follows: On August 1, 1931, the German subsidiaries of N.V. were indebted to N.V. or its subsidiaries in Holland to the extent of about 7,500,000*l*. sterling, and at this time the German government introduced financial legislation under which these credit balances were converted into what were known as blocked marks, with the result that N.V. and its Dutch subsidiaries were no longer able freely to obtain repayment from Germany of loans which they had advanced to their German subsidiaries for the provision of working capital, or of moneys due from them for the supply of raw material. About the same time the amount of Reichsmarks representing the trading profits of the subsidiary companies of N.V. in Germany ceased to be transferable to N.V. or its subsidiary companies in Holland. These Reichsmarks, which did not represent foreign claims on Germany, were classified as " inland marks " and could be used within limits for making investments in Germany. As a result of these and further financial restrictions later imposed the accumulated cash and cash investments held by N.V.'s subsidiary companies in Germany had risen by 1936 to a figure of about 61,000,000 Reichsmarks.

The possession of these large amounts of blocked and inland marks led the appellants to endeavour to find means of extracting the blocked marks from Germany, even at a considerable financial sacrifice. Accordingly, they obtained the consent of the German authorities to order the construction inside Germany, on behalf of N.V. or one of its associated companies, of ships for exportation and sale to foreign

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(1) 1 Dods. 81, 87.

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purchasers. As a term of their consent the German authorities required (inter alia) that part of the building price should be paid out of the proceeds of the sale of certain commodities which N.V. was to import into Germany. This obligation involved the expenditure of considerable sums in currency other than German, which amounted at first to 20 per cent. and later to 45 per cent. of the building price. Nevertheless, by these means N.V. and its associated companies were able to extract from Germany a proportion of the blocked mark balances and to convert them into foreign currency.

By the end of 1935 twenty contracts for the construction of forty-seven ships of approximately a quarter of a million tons had been placed, and between January and October of the succeeding year thirteen further contracts had been placed for twenty-one ships totalling over 200,000*l.* Meanwhile, in April or May, 1935, Dr. Schacht approached Hendriks and Rykens with a view to persuading the appellants to build a whaling fleet in Germany for operation under the German flag. But the appellants were able to avoid complying with the proposal at that time because Norwegian seamen experienced in whaling operations were needed for the successful prosecution of the whaling enterprise and the Norwegian government were unwilling to allow them to sail under the German flag. At the beginning of 1936, however, this obstacle had been overcome, and Rykens and Hendriks knew that similar proposals for the building of whaling fleets had been made by Dr. Schacht to two of the trade rivals of N.V. in Germany and that those trade rivals had agreed to undertake the task.

At this juncture Dr. Schacht again approached Hendriks. The terms then proposed contained the stipulation that the fleet could not be transferred from the German flag without the consent of the German government and that the vessels should be chartered to, and operated by, a German concern in which the appellants would enjoy no more than a half share. If accepted, the plan would attract a subsidy of 30 per cent. with a maximum of RM.3,500,000 from the Reich towards the construction of the fleet.

The appellants ultimately decided to accept the proposals and instructions were given so that the necessary arrangements for a contract with the German government might be made. Ultimately an agreement was reached by May 20, 1936, under which certain further provisions were confirmed. The appellants were to build a whaling fleet consisting of the *Unitas* and eight catchers at a total price of approximately RM.13,000,000, and in return were to receive from the Reich Government a subsidy of 30 per cent. of the building cost with a maximum of RM.3,500,000. The appellants were to advance the foreign currency required for the purchase of items supplied from abroad, estimated at 7,000*l*. sterling, and to be allowed to recoup themselves these advances plus a fair rate of interest by deliveries of whale oil from the first whaling season at fair market prices. They also agreed to finance such of the costs of the whaling expeditions as would have to be paid in foreign currencies on similar terms, and to operate the fleet when built through a working company at a charter price of a quantity of whale oil (estimated at 7,000 tons per annum) which they would afterwards sell to the German government at the ruling world price converted into Reichmarks. The balance of the whale oil was also to be sold to the German government by the working company on similar terms. The agreement was subject to the condition that the appellants should have treatment not less favourable than that accorded to their German competitors, and the Reich Air Ministry or Naval Observatory was to be permitted to set up meteorological stations on board the vessels and to arrange for experienced radio operators and short-wave equipment to be carried on board.

This history of the negotiations which led up to the building of the *Unitas* does not of itself show duress or, indeed, any undue pressure by the German government, but Rykens says categorically that the hidden threat was there. In the first place, he says that on a previous occasion in 1935 when N.V. was asked to supply guelders to the German government on credit terms and refused to do so, open threats were uttered by high officials in the Ministry of Finance that N.V.'s previous quotas would be cut, and that, although Dr. Schacht and Von Ribbentrop alleged that they were unaware of the proposed cuts, he had no doubt that they knew of the threats. The attitude of the German government and the covert threats lying behind the pressure that was brought to bear are perhaps best set out in Rykens' own words at the end of his affidavit in para. 28: "Though my conversations with Dr. Schacht "and also Herr von Ribbentrop were conducted in a courteous "manner I was never left in any doubt as to the reality of the "threats lying behind their proposals and I have no doubt "at all that if N.V. had not agreed to the building of the "whaling fleet in Germany for operation under the German "flag effective steps would have been taken to confiscate or "render virtually valueless the N.V. assets in Germany and to "restrict to the minimum any further carrying on of business "by N.V. in Germany. As an illustration of the high-handed "and lawless action of the German authorities I would mention "that before the outbreak of war one of N.V.'s German subsidiaries carrying on business in East Prussia had the quota "of one of its factories arbitrarily taken by the German "authorities so that it was forced to cease carrying on business."

In the succeeding paragraph he shows the method adopted by the German government in compelling compliance with their wishes in the following words: "But for the pressure "brought to bear by Dr. Schacht and the sanctions which the "German government was in a position to impose had N.V. "not ultimately complied with their demands, the said whaling "fleet would never have been built and thereafter owned and "operated under the German flag. The construction of the "said whaling fleet was not voluntarily undertaken by N.V. "nor was it a freely chosen investment which N.V. decided "to make of their own volition. N.V. was in my respectful "submission forced by the German government into a position "in which they had no alternative but to comply with the "German government's demands."

Their Lordships are prepared to accept for the purpose of their decision Rykens' statements, but they are nevertheless of opinion that they are insufficient to constitute a ground for rejecting the conclusiveness of the fact of flying the German flag. In the course of his judgment the President said that he did not doubt at all that the German government were in a position to bring economic pressure on foreign concerns trading in the country through German subsidiaries; nor would they hesitate to bring to bear any such pressure as they thought would serve their purpose (1). Indeed, he envisages the possible confiscation of N.V.'s German business as one of the steps which might be taken; and in their Lordships' view the threat is none the less serious though one of the adverse actions which the German government contemplated was the cancellation of the orders for ships to be built in Germany and sold abroad. In any case, it was a threat of the most serious character and their Lordships are in no sense minded to minimize its importance.

(1) [1948] P. 218.

But the question remains whether a threat to the economic interests or even existence of the N.V.'s German subsidiaries is enough to render a ship flying the German flag immune from the sanction of seizure and condemnation. It does not, in their Lordships' view, assist the appellants' case to speak of the building of the whaling fleet and its German registration and chartering to a German company as involuntary. In truth, it was not involuntary in the sense of being unintentional: it was a deliberate choice taken between two distasteful alternatives. It is only involuntary in the sense that the appellants would have preferred not to make a choice at all. Faced with the obligation of doing so, they made their election. And it is not irrelevant to remember that that election was made two years before war broke out and, though no accounts have been furnished and possibly none could be furnished, yet the ship was built in time to perform a whaling voyage at any rate in 1938 and may well have earned considerable emoluments for her owners. The fact that she was built as a result of German pressure and German threats because a worse fate might have befallen the claimants if they did not give way seems to their Lordships a totally inadequate reason for avoiding the natural consequence of flying the German flag.

The strictness with which the rule is followed is accentuated again and again in the prize law of many countries and in the text-books dealing with the topic. Wheaton, Hall and Oppenheimer all state the principle in unqualified terms. It is enough to quote the first named (8th ed.) at p. 588: "According to the rules observed in the British Prize Courts "the flag of the enemy is conclusive against the ship flying "it, but our courts can go behind a neutral flag and ascertain "who is the real owner and enemy shares in a ship flying "a neutral flag can be condemned."

The cases to the like effect are well known and numerous. The two earliest reported, *The Vigilantia* (1) and *The Vrow Elizabeth* (2), contain unequivocal statements to the like effect, and indeed it is not disputed that this is the general rule. But it is said that the principle does not apply except in cases where the owners voluntarily chose to accept the benefit of the enemy flag for their own advantage. To support this argument reliance is placed on the type of expression to be found in *The Fortuna* (3), where the wording is: "All that the "court has thrown out respecting the effect of the flag and

(1) 1 Ch. Rob. 1.

(2) 5 Ch. Rob. 2.

(3) 1 Dods. 87.

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"pass is this, that the party who takes the benefit of them "is himself bound by them . . . ., but they do not bind "other parties as against him"; or perhaps more clearly in *The Primus* (1), where the words used are: "If he reap "the benefit accruing during peace, he must also take the "consequence of war."

Similar expressions are to be found in many of the cases, but in their Lordships' opinion a conclusion that a shipowner who built his ship, unwillingly it may be, but still with the object of avoiding a position less favourable to himself, and sailed her under an enemy flag would avoid seizure and condemnation in prize in the event of war is altogether unjustified. The statement that the shipowner has taken the benefit and must endure the consequences is not in essence a limitation of the doctrine, but an explanation of its origin.

It is true that as pointed out above Sir William Scott says in *The Vrow Elizabeth* (2): "I do not say that there may not "be cases of such particular circumstances, as to raise a reason-"able distinction," and instances a case where after the peace of Amiens the French failed to fulfil an undertaking to provide shipping to repatriate British subjects and ships flying an enemy flag were thereupon used for that purpose, and after outbreak of war held free of condemnation. So, too, in *The Tommi* (3) it was said: "The law with regard to the effect "of carrying the flag is perfectly clear, namely, that if a ship "does sail under a particular flag, unless there are very special "exceptions, she has elected to enjoy the protection of the "State whose flag she flies, and she is regarded as a ship "belonging to that State."

Their Lordships accept the view that there may be circumstances which make the flying of the enemy flag inconclusive as a reason for condemning a ship in prize, but such circumstances must be very exceptional. The few in which a ship flying the enemy flag has escaped condemnation are all of that character. In addition to the cases mentioned in *The Vrow Elizabeth* (2) their Lordships' attention has only been called to three, and they are not aware of any others. Those three are *The Palme* (4), mentioned in Wheaton, p. 153, *The Taxiarchis* (5), also referred to in Wheaton, and *The Pontoporos* (6).

(1) Spinks P. C. 48, 50.
(2) 5 Ch. Rob. 7.
(3) [1914] P. 251, 256.
(4) Dalloz, Jurisprudence General, vol. III, 94.
(5) 20 R. G. D. I. P. 518.
(6) 1 Br. & Col. P. C. 371.

The Palme was a German vessel purchased by the Swiss Red Cross from German owners. The Swiss government would not allow their flag to be flown, the French government forbade the use of its flag, and in default of any other the German flag was retained and a German agent appointed. The circumstances were peculiar and exceptional, and a French Prize Court decreed her release.

The Taxiarchis (1) was a case exhibiting some features of the same kind: she was British-owned and registered in Cyprus, which at that time was nominally under Turkish rule but actually administered by Britain. There was no national flag of Cyprus, and therefore she flew the Turkish flag. In each of these cases, the absence of a national flag coupled with the neutral or friendly nationality of the owners was the deciding factor.

In *The Pontoporos* (2), a Greek ship was captured by the Emden and used as a coaling auxiliary, but her master never consented to her use as such and was kept a prisoner. The case is a true example of involuntary submission to enemy duress. Indeed, the Prize Court which tried her case contrasted it with that of *The Carolina* (3) where the master had, though unwillingly, accepted service under an enemy belligerent, and the basis of the decision is explained as follows (4): " The act of force," it was said, " referred to by the learned " judge would seem to be the laying of an embargo on the " ship, and fitting her up as a transport against the will of the " master, and during his absence; but the facts show that " when he returned he acquiesced." And in *The Carolina* (3) itself, Lord Stowell says (5): " A man cannot be permitted " to aver that he was an involuntary agent in such a trans- " action. If an act of force, exercised by one belligerent on " a neutral ship or person, is to be deemed a sufficient justifica- " tion for any act done by him, contrary to the known duties " of the neutral character, there would be an end of any " prohibition under the law of nations to carry contraband, " or to engage in any other hostile act."

The circumstances in the last-mentioned case in substance resemble those now under consideration, whereas those in the three cases relied on by the appellants are in a different category. It is, as a general rule, where captors are concerned, the use of the enemy flag which entitled them to seize. Neutral

(1) 20 R.G.D. I P. 518
(2) 1 Br. & Col. P.C. 371.
(3) 4 Ch. Rob. 256.
(4) 1 Br. & Col. P. C. 379.
(5) 4 Chr. Rob. 261.

ownership of itself does not protect the ship. *The Ocean Bride* (1), was British owned and flew the British flag but was nominally transferred to Russian ownership to protect her from seizure in case of war between this country and Russia. On those facts being established, she was released. As showing the importance of the flag it was said in the course of the judgment (2): " If this vessel had been sailing under " the colours of an enemy, I should say this was a claim which " could not be sustainable ; but here she remains navigated " under British colours—and that prevents a difficulty which " would have been insuperable—for, if the vessel had been " under Russian colours, that would have been conclusive " against all the world, for reasons I need not refer to, as it is " a well-known principle."

Their Lordships have thought it desirable to deal at some length with the grounds on which the appellants support their case, as the claim is a large one and the principle at stake important. From the authorities which have been referred to, it is clear that the flag under which a ship sails constitutes one of the most, if not the most, important elements which a Court of Prize has to consider in determining whether she is rightly seized and condemned as prize. But it is not necessary for them to set exact bounds to the limitations to be placed on the dicta that the flying of an enemy flag is conclusive, or to pronounce on the correctness or otherwise of every decision relied on or the accuracy of every individual expression of opinion contained therein. Whatever view may be taken on the matter, the present case is, in their Lordships' opinion, far removed from those exceptional cases in which that rule may be discarded.

In the view of the Board the *Unitas* was rightly seized and condemned, and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, with costs.

Solicitors: *Simpson, North, Harley & Co.; Treasury Solicitor.*

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(1) Spinks P. C. 66.

(2) Ibid. 73.

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Apl. 18.

PIYARATANA UNNANSE AND ANOTHER APPELLANTS ;

AND

WAHAREKE SONUTTARA UNNANSE
(DECD.) AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Procedure—Amendment of decree—Alleged variance between judgment and decree—Code of Civil Procedure (*Legislative Enactments of Ceylon, c.* 86), *s.* 189, *sub-s.* 1.

By s. 189, sub-s. 1, of the Code of Civil Procedure: "The "court may at any time, either on its own motion or on that of "any of the parties . . . . make any amendment which is "necessary to bring a decree into conformity with the judgment."

Section 189 of the Civil Procedure Code of Ceylon, which embodies the provisions of Or. 28, r. 11., of the English Rules of the Supreme Court and the inherent jurisdiction vested in every court to ensure that its order carries into effect the decision at which it arrived, provides an exception to the general rule that, once an order is passed and entered or otherwise perfected in accordance with the practice of the court, the court which passed it is functus officio and cannot set it aside or alter it, however wrong it may appear to be—that can only be done on appeal. Section 189 is, however, an exception within a narrow compass; it does not take away any right of appeal which the parties may possess, but merely provides a simple and expeditious means of rectifying an obvious error.

Accordingly, where the appellants petitioned the district court to amend its decree on the ground of an alleged variance between the judgment of the court and the decree based on it—there being no question of any clerical error or accidental omission in the decree—and a perusal of the judgment and decree disclosed no such variation as alleged, and the decree embodied the declaration which the judge expressed himself as prepared to make,

Held, that it was not the type of case which fell within s. 189 of the Code.

Decree of the Supreme Court of Ceylon affirmed, but for different reasons.

APPEAL (No. 20 of 1948) against a decree of the Supreme Court of Ceylon (May 17, 1944) which set aside an order of the District Court of Kandy (March 22, 1943) whereby a decree of that District Court, dated February 6, 1941, in favour of the appellants was directed to be amended in the manner specified.

**Present* : LORD SIMONDS, LORD MACDERMOTT, LORD REID and SIR JOHN BEAUMONT.

The power of a court in Ceylon to amend its own order was conferred by s. 189, sub-s. 1, of the Civil Procedure Code, which provides " The court may at any time, either on its " own motion or on that of any of the parties, correct any " clerical or arithmetical mistake in any judgment or order " or any error arising therein from any accidental slip or " omission, or may make any amendment which is necessary " to bring a decree into conformity with the judgment."

In the application giving rise to this appeal the contention of the appellants was that the decree of the district court, dated February 6, 1941, omitted to give to the appellants the right to certain land edged green on " Spencer's Plan " (hereinafter mentioned), whereas, according to the contention of the appellants, the judgment on which that decree was based had conceded such right. The district judge before whom the application came, who was not the same judge as the one who had passed the decree, accepted the contention of the appellants, and amended accordingly the decree passed by his predecessor. On appeal, the Supreme Court (Howard C.J. and De Kretser J.) held that the judgment on which the decree of February 6, 1941, was based had decided against the title of the appellants to the land, and that there was no case for amending the decree.

The relevant facts appear from the judgment of the Judicial Committee.

1950. March 13, 14. *Stephen Chapman* for the appellants. There were in effect two questions in the proceedings: (1.) whether the decree of February 6, 1941, did correctly record the court's determination of the matters in issue; and (2.) whether the district court was the proper court in which to proceed for amendment of the decree. On the latter question, it is submitted that the district court's reasons for holding that it was the proper court were quite conclusive, and that court also held that the decree did not correctly record the court's determination. The Supreme Court, in appeal, dealt with the first question only, and held that the district court had decided that the appellants were not entitled to the land in issue. The first question involves what is the delimitation of certain property in Kandy, the case for the appellants being that, while the issue was as to title, there was no contest whatever as to the area of the property in question. It was in fact in substance agreed to be an area of one amunam

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paddy sowing in extent, which is roughly two acres. It was only when the respondents had lost the battle as to title that they changed their tune, and, the case having been remitted to the district court to deal with their claim for compensation for improvements, they then said that, so far from comprising an area of two acres with the buildings on it, it comprised only one portion of one of the buildings which was on the land.

On the second point, it has been decided that if it is desired to have a decree amended the proceedings must be taken in the court whose decree it is, and it has also been held in Ceylon that if a decree has been made in the district court the proceedings must be taken in that court under s. 189 of the Civil Procedure Code. If, however, there is an appeal to the Supreme Court, then the authorities seem to establish that if the district court is reversed the relevant decree is that ordered by the Supreme Court, and even if the district court is confirmed the relevant decree is the confirming decree of the Supreme Court.

The latter proposition will be contested if necessary, but it is submitted that it is not necessary to do so here, because there never was any decree of the Supreme Court which confirmed, varied or reversed the decree of the District Court of Kandy of February 6, 1941. Section 189 of the Ceylon Civil Procedure Code is plainly taken from Or. 28, r. 11, of the English Supreme Court Rules. In this country there is the slip rule strictly so called, which deals with correcting mistakes, and there is in addition the inherent jurisdiction of the court to put right its own orders if it is found that they do not set out the manifest intention: *MacCarthy* v. *Agard* (1)

The question therefore is whether the decree of February 6, 1941, conformed to the intention of the district judge; and it is necessary for the appellants to show in the judgment of February 6, 1941, an intention to deal with the land. There, staring the judge in the face, was an issue which in terms mentioned the land. It would be very astonishing if he had considered all the relevant evidence—including the documents—and had delivered a judgment which simply failed to deal with the land. If he had taken the view that he could not deal with the land apart from the other claims, surely he would have said so. It was manifestly intended to deal with this issue as to the land and to decide it; he did decide it in favour of the appellants; and his successor was right in amending the decree accordingly.

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(1) [1933] 2 K. B. 417, 425.

Havers K.C. and *Handoo* for the respondents. For the appellants reliance has been placed first on the slip rule as defined in s. 189 of the Ceylon Civil Procedure Code, and secondly, on the inherent jurisdiction of the court. This is a remarkable case in which to seek the application of s. 189. It is not a case where the judgment expressly says one thing and the decree says another, but one in which the decree as drawn up is in complete conformity with the judgment as expressed by the judge. The appellants are really asking the court, using the power of s. 189, to amend the judgment, and secondly, to amend the decree so as to bring it into conformity with the judgment as amended. The appellants, whether they are seeking to invoke s. 189 or the inherent jurisdiction of the court, must satisfy the board that there was an obvious error in expressing the manifest intention of the court: The Annual Practice, 1949, pp. 495 and 496. In this case, so far from there being a clear case, it is surrounded with doubt: the district judge interpreted the judgment of February 6, 1941, in one way, and the Supreme Court on appeal in the opposite way, and it is submitted that there is a third way which is quite consistent with the judgment, namely, that the judge inadvertently did not decide this question of the right to the land at all—that is a highly probable alternative—and if that view be right the appellants ought not to succeed in this case. But the Supreme Court went further, and said that the judge found against the appellants with regard to this land.

Stephen Chapman, in reply, referred to *Lawrie* v. *Lees* (1).

April 18. The judgment of the Lordships was delivered by SIR JOHN BEAUMONT. The first question which arises for decision by the Board is whether the district judge had any power on the application before him to amend the decree of his predecessor. If this question be answered, as their Lordships think it must be, against the appellants, the appeal must fail, and it is unnecessary to determine any other question.

The facts giving rise to this appeal are not in dispute. The litigation started in the District Court of Kandy on July 4, 1934. The parties were all Buddhist priests, and the question in issue related to the ownership and right to possession of

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(1) (1881) 7 App. Cas. 19, 34.

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a monastic building known as the " Meda Pansala " as appurtenant to a larger monastic temple known as Degaldoruwa Vihare. The plaint did not describe the property claimed by metes and bounds or by reference to any plan, as it should have done under s. 41 of the Civil Procedure Code, nor did the defence raise any question as to the boundaries or area of the Meda Pansala. At the trial twelve issues were raised relating to (1.) the title to the Meda Pansala of the plaintiffs, present appellants ; (2.) the claim of the defendants, present respondents, to have acquired a right to the said Meda Pansala by prescription ; and (3.) the claim of the defendants to the cost of improvements alleged to have been made by them to buildings comprised in the Meda Pansala and a consequent right to a jus retentionis. No issue as to area was raised.

On February 10, 1936, the district judge gave judgment in the suit, holding that the plaintiffs had proved their title to the Meda Pansala but that such title was barred by limitation. Accordingly, he dismissed the action.

On appeal, the Supreme Court agreed with the district judge in thinking that the plaintiffs had proved their title, but differed from him in thinking that such title was barred by limitation. Accordingly the decree of the district judge was set aside, and issues 9, 10 and 11 (which concerned the claim of the defendants to the cost of improvements and the jus retentionis) were remanded to the lower court.

In dealing with the remanded issues it was agreed between the parties that it would be necessary to define the Meda Pansala, and accordingly a commission was issued to a surveyor named Spencer to make a plan of the Meda Pansala. Spencer duly prepared a plan (which is the plan hereinbefore referred to as " Spencer's Plan ") in which he showed the Meda Pansala as consisting of buildings, marked lots 1–10 inclusive, and some open land (presumably garden land) which was edged green on the plan. The present dispute relates to that piece of open land. The plaintiffs claimed that the Meda Pansala comprised the whole property shown on the plan, but informed the court that they raised no claim in the present action to lots 7–10 since rights of persons not parties to the action were involved. The judge thereupon raised a fresh issue, No. 13, in these terms : " Do the buildings marked 1, 2, 3, 4, 5 and 6, " and the land shown in the inset edged green, in Mr. Spencer's " plan, represent the Meda Pansala which is the subject-" matter of this action ? "

At a subsequent date, namely, on August 28, 1940, counsel for the plaintiffs informed the court that lots 3 and 6 were in the same position as lots 7–10 and that he did not propose to raise the title to those lots in the action. The judge thereupon stated that issue 13 would be modified by substituting in place of the lots referred to in that issue the following lots only ; 1, 2, 4 and 5.

At the trial of the remanded issues it was common ground that lot 2 was comprised in the Meda Pansala, and the dispute was as to lots 1, 4 and 5. The judge in his judgment delivered on February 6, 1941, after noticing that the titles to lots 3 and 6–10 were not being investigated in the suit, stated that issue No. 13 had been modified so as to include in it only lots 1, 2, 4 and 5. Whether the judge was right in treating issue No. 13 as not embracing the land edged green may be open to question, but their Lordships think it clear that the judge, having treated the issue as so limited, confined his judgment to that issue.

After considering the evidence submitted, the judge said : " Upon a consideration of the evidence placed before the court " by the parties, I have come to the conclusion on the issues " submitted for adjudication that the Meda Pansala is com- " prised of lots 1, 2, 3, 4 and 5, and not merely of lot 2 as " contended for the defendants."

The judge summed up his conclusions at the end of the judgment in these words : " In the result, I would hold on " issue 13 as framed by me that the Meda Pansala which is " claimed to be an appurtenant of the Degaldoruwa is comprised " of lots 1, 2, 4 and 5 subject to the reservation as regards the " further claims to the buildings which have been made in the " course of the trial."

On this judgment the decree of February 6, 1941, was drawn up. It ordered and decreed that the first plaintiff be and he was thereby declared entitled to the possession of the Meda Pansala as an appurtenance and endowment of the Degaldoruwa Vihare as comprised of lots 1, 2, 4 and 5 in plan dated July 16, 1938, made by Spencer and filed on record in the case.

The respondents filed an appeal from this decree, but on October 1, 1942, the Supreme Court dismissed the appeal on a preliminary objection. It is common ground between the parties that as the Supreme Court did not enter on the merits of the dispute its order in appeal has no relevance in these proceedings.

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On January 11, 1943, the appellants presented a petition to the District Court of Kandy praying that the decree of February 6, 1941, be amended by including in the declaration of the plaintiffs' title the right to the land edged green in Spencer's plan. The basis of the petition was that there was a variance between the judgment and the decree. At the hearing of the petition the then District Judge of Kandy accepted the contention of the appellants and amended the decree of February 6, 1941, by the interpolation after the figure " 5 " of the words : " and the land shown in the inset " edged green."

The judge was of opinion, reading the judgment of his predecessor as a whole, that it amounted to a finding in favour of the title of the plaintiff to the land edged green. On appeal, the Supreme Court set aside the order of the district judge. The judges of the Supreme Court did not consider the question whether the district judge had power to amend the decree made by his predecessor, but held that the judgment on which the decree of February 6, 1941, was founded had held against the plaintiffs' title to the land edged green. " It is obvious," said the Chief Justice in delivering the judgment of the court, " that he [the district judge] held that the plaintiffs were not " entitled to the land shown in what is described as the inset " edged green."

Their Lordships find themselves in agreement with the conclusion reached by the Supreme Court, but not with the reasons on which such conclusion was founded. The general rule is clear that, once an order is passed and entered or otherwise perfected in accordance with the practice of the court, the court which passed the order is functus officio and cannot set aside or alter the order however wrong it may appear to be. That can only be done on appeal. Section 189 of the Civil Procedure Code of Ceylon, which embodies the provisions of Or. 28, r. 11, of the English Rules of the Supreme Court and the inherent jurisdiction vested in every court to ensure that its order carries into effect the decision at which it arrived, provides an exception to the general rule, but it is an exception within a narrow compass. The section does not take away any right of appeal which the parties may possess : it merely provides a simple and expeditious means of rectifying an obvious error. In the present case there was no clerical error or accidental omission in the decree, and the case of the appellants is based on an alleged variance between the judgment of the court and the decree based on it. In such a case the variation should appear on a perusal of the judgment and decree. No such variation is apparent in the present case. The decree embodies the declaration which the judge expressed himself as prepared to make. The argument of the appellants is that when the judgment is read as a whole the judge really decided more than he professed to decide. That involves the construction of the judgment, a matter open to serious doubt, as is shown by the fact that the trial judge thought the decision to be in favour of the plaintiffs, whilst the appeal court thought it to be against the plaintiffs. In their Lordships' view, that is not the type of case which falls within s. 189 of the Civil Procedure Code, and that is sufficient to dispose of this appeal. Their Lordships would add, however, that, having carefully considered the terms of the judgment of February 6, 1941, and having heard an elaborate argument as to its meaning and effect, they do not find themselves in agreement with the view of either of the courts in Ceylon. They are satisfied that in his judgment of February 6, 1941, the judge did not decide, or intend to decide, on the title to the land edged green. The highest the case can be put on behalf of the appellants is that there are passages in the judgment which suggest that, if the judge had been minded to decide the question, he would have decided it in favour of the appellants. The judge may have had good reasons for not deciding the question. He may have thought it inappropriate to decide on the title to a piece of open land when he was dealing only with issues relating to the cost of improvements in buildings, or he may have thought that any such decision might be embarrassing to parties not before the court who had interests in the land. At any rate, whatever his reasons may have been, their Lordships are satisfied that the judge deliberately refrained from deciding the title to the land edged green, and that matter is still at large.

For these reasons their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs.

Solicitors: *Darley, Cumberland & Co.; Burchells.*

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